No. 21307

In the

United States Court of Appeals

FOR THE NINTH CIRCUIT

FLUOR CORPORATION, LTD., et al UNION TANK CAR COMPANY WARD INDUSTRIES CORPORATION, now known as DRAGOR SHIPPING CORPORATION, *Appellants,* *Cross Appellees,* *v.* U.S.A., EX REL MOSHER STEEL COMPANY, *Appellee,* *Cross Appellant.*	No. 21307 No. 21307A No. 21307B No. 21307C

BRIEF OF APPELLEE MOSHER STEEL COMPANY RESPONDING TO APPELLANT UNION TANK CAR COMPANY

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U.S.A., EX REL MOSHER STEEL COMPANY, *Appellee,* *Cross Appellant.*	

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JURISDICTIONAL STATEMENT

The jurisdiction of the court below with respect to Mosher's [1] claim for relief against Union was based on diversity of citizenship, the amount in controversy exceeding $10,000 (28 U.S.C. 1332). Mosher is a Texas corporation having its principal place of business in the State of Texas

[1] The following terminology and abbreviations as used in the trial court are employed in this brief: Union and Graver are one and the same; Joint Venture is the same as IMI-Ward; "R"—Record on Appeal; "RT"—Reporter's Transcript; "Jt."—a stipulated joint exhibit; "Pl."—exhibits introduced in evidence by Mosher; Ward and Union exhibits, respectively, identified by Ward and Union.

(R. 268, 1220). Union is a New Jersey corporation having its principal place of business in the State of Illinois (R. 272, 1221).

In addition, jurisdiction with respect to Union under Count I of the Amended Complaint exists by virtue of Section 270 A and B, Title 40 U.S.C., commonly known as the Miller Act. Jurisdiction of this court is invoked by Appellant pursuant to 28 U.S.C. §§ 1291 and 2107, and Rule 73 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The court will discover in reading the briefs of Appellants Union and Ward in this cause that, throughout the trial of the case and the briefs on appeal, both Appellants attempted to greatly complicate and confuse the fact situation upon which the trial court has rendered its judgment, in an effort to place Appellee Mosher between Scylla and Charybdis, so that if Mosher escapes the legal pitfalls dug by one, it necessarily plunges into the legal pitfalls dug by the other. Indeed, both Appellants at times attempt to so confuse the issue that their efforts would result in the proposition that Mosher was not entitled to collect its undenied losses at all, not because it had not dealt with either, but because it had dealt with both. In Union's and Ward's briefs a rather simple, and clearly understandable, business relationship is twisted by each Appellant in turn to the point where the brain sometimes reels in confusion. In so doing, the Appellants largely ignore the trial court's Findings of Fact, which are both complete and chronological, and which resolve conflicting testimony consuming nine days of trial, a thousand pages of reporter's transcript, a dozen depositions, and a hundred exhibits.

The actual contractual relationship shown by the facts is simple, as follows: At the outset Union, through its Graver Division, obtained subcontracts from Fluor for the

Tucson work and Matich Bros. & Sundt for the Vandenberg work. Union in turn entered into a contract with a Joint Venture, composed of Idaho-Maryland Industries, Inc. and Ward Industries Corporation for the performance of certain work which it was later concluded the Joint Venture could not wholly perform within the time required. Thus certain portions of the Joint Venture's work were ordered by Union to be sent elsewhere. Insofar as Mosher is concerned the matter commenced by a negotiated agreement between Mosher and Union for the performance of a part of that work which the Joint Venture could not perform for the Tucson job. This agreement by Mosher with Union (rather than with the Joint Venture) was occasioned by the fact that Mosher would not accept the credit of the Joint Venture. Upon learning of Mosher's prices, which were less than the Joint Venture's prices to Union for the same work, George Morton, manager of the Joint Venture did not like the fact that Mosher would contract with Union directly as to work which the Joint Venture had already agreed to perform under its contract with Union, because the Joint Venture had a profit in the price of steel fabrication in its contract with Union, over and above the price which Mosher had agreed to charge Union.

As a result, the Joint Venture approached Mosher in an effort to have Mosher cancel its initial agreement with Union and accept purchase orders for the same work on the Tucson job from the Joint Venture and in addition a small amount of work for the Vandenberg job.

Mosher took the position that it would accept the Joint Venture purchase orders and accede to the request of the Joint Venture, but only if Union would be responsible to Mosher for payment.

As a result of these demands by Mosher, the Joint Venture and Union then agreed that Mosher could accept the Joint Venture purchase orders and accommodate Union

and the Joint Venture by so doing and by billing the Joint Venture for its accounting convenience, and that Union would reduce the dollar amount of the Joint Venture-Union subcontract and pay Mosher *direct* after the materials were received by the Joint Venture and Mosher's billing had been checked out and approved by the Joint Venture. Union then agreed with Mosher that it would pay Mosher direct and deduct the payments from the contract price between Union and the Joint Venture.

Once the Union obligation was received, Mosher proceeded to fully perform the tri-partite agreement by fabricating the materials and delivering them pursuant to the Joint Venture purchase orders, relying, under the agreements, upon payment direct by Union.

But neither Union nor Ward (as a member of the Joint Venture) has paid Mosher, hence this suit of incredibly voluminous record.

Because of the necessity of detailed billing on the basis of sites and levels in the Missile projects, the Mosher invoices so billed were received by the Joint Venture shortly before IMI., one of the joint venturers, entered Chapter XI proceedings in Los Angeles. Once the Chapter XI proceeding was filed, both Ward, as a member of the Joint Venture, and Union began a vast series of disputes and litigation between themselves, each pointing the finger at the other in connection with the Mosher claim, but in so doing attempting through allegations of inconsistency to enmesh Mosher in a morass of legal bars. The plain truth of the matter is that Mosher's position before and during this suit has never changed, and the facts upon which the trial court has found agreements have consistently appeared from the very outset.

In short, Mosher's position is, and the Court has found, that, based upon ample consideration, both Ward, as a mem-

ber of the Joint Venture, and Union, are each obligated to Mosher, regardless of the positions which Union and Ward have taken, as between themselves, in other litigation and settlements.

Many of the points argued and cases cited in Appellants' briefs apply to side-street and tangential issues which are not involved in this case, but which Appellants have sought to create through distorting or denying the simple fact situation which the trial court has found.

The basic principle of law here involved is the undisputed law of contracts that two persons may validly make, and be bound by, a separate promise that the same performance shall be rendered, and a single person may validly promise the same performance to two parties. This is what has happened under the facts of this case, that is, Union and Ward each obligated itself to pay Mosher, each for its own purposes, and Mosher promised and performed the same performance to both Union and Ward, to-wit, the furnishing, fabricating and delivery of the material for Tucson and Vandenberg.

Union's Statement of the Case contains numerous statements which are not supported by the record, and others which are fragmentary references to the record, some of which are in conflict with the Findings of Fact of the Trial Court; some of which are pertinent, and some of which are not pertinent to the Specification of Errors upon which Union's appeal is predicated. In its very first paragraph Union states that it paid the Joint Venture for the steel fabrication work performed by Mosher. There is nothing in the record to sustain such a statement. In addition, it is immaterial in so far as Union's obligation to Mosher is concerned.

Another example is the statement that Sam Wilson had no authority to negotiate the issuance of a Graver purchase

order to cover Mosher's material fabrication, and that the trial court had rejected the Finding that Union had authorized or ratified Wilson's actions in negotiating with Mosher for the Graver purchase order. Both such statements are refuted by Findings of Fact 20 (R. 1226) and 25 (R. 1227). The statement on page 10 of Union's brief that that Orr and Holmes, representing the Joint Venture, left the meeting on October 31st with the understanding that Mosher would undertake the work on Joint Venture purchase orders is not consonant with the Trial Court's Finding of Fact No. 29 (R. 1228 and 1229).

The entire sequence of events between November 7th and November 15th is omitted from Union's Statement of the Case, and words not found in the reporter's transcript are inserted, such as the word "assuring" in the statement of Moore's requirement that Graver be responsible for payment on page 11 of Union's brief, the insertion of the words "Davis-Monthan order" on page 13, and the assertion that Moore's conversation with Page related solely to the Davis-Monthan job contained on page 14 of Union's brief. In addition, the words "final approval" are inserted in connection with the letter which Page's telegram and telephone conversation indicated Page was to send Moore in lieu of the words "complete details" on page 23 of Union's brief.

It is respectfully submitted that an understanding of the facts of this case and the distortions contained in Union's brief can best be had by reading the trial court's comprehensive findings. In addition, since Union has seen fit to rehash the facts as if the trial had never occurred, Appellee will refer to the testimony and evidence where appropriate in its argument in response to Union's points of error.

APPELLEE'S RESPONSE

Of the seven points of error urged by Union in its brief, Union argues Specifications of Error No. 1, No. 2, No. 3 and No. 4 under one heading as Point 1. Ensuing Points 2, 3

and 4 cover Specifications of Error 5, 6 and 7, respectively. Appellee's Response will, for the convenience of the Court, be presented in the same manner.

ARGUMENT

RESPONSE TO POINT I.

The court was *correct* in holding that "Page's telephone conversation with Moore on November 15, 1961 and his telegram to Moore of the same date, together with Mosher's resulting action on November 16, 1961 and subsequently with relation to joint exhibits 9 and 10 in evidence constituted a contract and had the legal result of obligating Union to pay Mosher directly for all sums becoming due to Mosher under the terms and provisions of joint exhibits 9 and 10 for furnishing, fabricating and delivering steel to the Tucson and Vandenberg jobs" (Conclusion of Law No. 6, R. 1238).

Summary of Argument

The Trial Court has properly found on a preponderance of the evidence and in resolution of conflicting testimony that the November 15 Page-Moore telephone conversation and the performance of Mosher in proper reliance thereon, constituted a valid contract whereby Union became obligated to pay Mosher for all work performed under the Joint Venture Purchase Orders at both Davis-Monthan and Vandenberg. The Trial Court has further properly found that this oral contract was complete, and included the entire work embodied in the purchase orders, and that such promise was not only in its terms, direct, but was also direct under applicable law in Illinois and all the other States. The mere fact that the Joint Venture also became obligated to Mosher renders Union's obligation no less binding and no less direct. Under the facts, also, Union is, in any event, estopped from raising the contention that a letter agreement was a condition precedent to the contract, because, under the cir-

cumstances found by the Trial Court on ample evidence, to do so would permit Union to perpetrate a fraud upon Mosher.

In its Point I, Union assails the trial judge's Findings of Fact and Conclusions of Law by assailing first the court's Findings of Fact No. 35 and No. 39 as being "unsupported by any substantial evidence,"; being "contrary to undisputed and documentary evidence," and being "in substantial part statements of erroneous legal conclusions rather than findings of fact." Union then attacks the court's Conclusion of Law No. 6 (R. 1238) in its Specification of Error No. 2, the court's Conclusions of Law Nos. 6, 7 and 11 in its Specification of Error No. 3, and the court's Conclusion of Law No. 7 in its Specification of Error No. 4.

In order that the court may fully understand the circumstances which resulted in the trial court's Findings of Fact and its Conclusions of Law, and the overwhelming evidence which supports them, Appellee believes that it is necessary that the chain of evidence be presented in chronological order so that the court will be aware of all the surrounding facts and circumstances involved.

Prior to October 13, 1961, Union had obtained a subcontract from Fluor in the amount of $16,500,000.00, for a part of the construction of the Tucson Missile Base Project. It had, on July 28, 1961, executed a Letter of Intent with IMI-Ward whereby a certain part of the Union subcontract was let to IMI-Ward Joint Venture for the sum of $7,971,000.00, less the cost of Graver supplied materials.

Prior to the execution of the subcontract between Union and the Joint Venture, which was executed on October 23, 1961, and while Union and the Joint Venture were operating under the Letter of Intent dated July 28, 1961, Union's officers concluded that the Joint Venture could not perform the work within the time allotted and, in September of 1961, Mr. Root, the President of Graver, Mr. Lancaster, the

Vice President of Graver, and Mr. Harle, Director of Purchases and Expeditor for Graver on the Tucson job, met with George Morton, the Manager of the Joint Venture in Los Angeles, to determine how best to expedite the job, (Morton Dep. p. 12, P1. 39) and Morton was told by Graver's officers that Graver would guarantee any of the contracts which the Joint Venture had to put out to others for the purpose of getting on schedule (Morton P1. 39, p. 23). S. A. Wilson, Manager of the Denver Steel and Iron Works Division of IMI, was informed of Graver's commitment to guarantee the contracts which the Joint Venture put out to others at Graver's request, in order to get on schedule (Morton, P1. 39, p. 25).

In the last week in September 1961, Lancaster and Harle came to Wilson's office in Denver and insisted on an improved delivery schedule (R.T. 185), and on October 10 or 11, 1961, Harle and Lancaster issued instructions to Wilson to place some of the work in other plants (R.T. 185).

Pursuant to this directive, Wilson called Mitchell, Plaintiff's Senior Contracting Engineer at Dallas, and arranged to come to Dallas to meet with Mitchell with respect to the fabrication and furnishing of steel which had theretofore been assigned to the Denver Steel division of IMI.

Preparatory to going to Dallas, Wilson told Harle and Lancaster that he didn't believe Mosher would take an IMI purchase order, and asked permission to give Mosher a Graver purchase order (R.T. 187), and Lancaster told Wilson that a Graver purchase order would be forthcoming (R.T. 188). There is nothing in the record which disputes Wilson's testimony as to Wilson's authority from Lancaster, who was Vice President of Graver in charge of the Tucson Project.

Prior to that time, at a meeting in the office of Graver in Chicago on June 9, 1961, Messrs. Root, Lancaster, Morton and Wilson had set up the procedure for handling the raw

material and other purchases on the job (R.T. 231), pursuant to which Wilson negotiated for the purchase of steel for the job and:

> ". . . always negotiated on the basis that Graver Company would issue the purchase order. This was necessary because of credit reasons." (R.T. 232—also R.T. 222.)

As Director of Purchases, Harle issued purchase orders for Graver (R.T. 905), and Harle would probably have issued any formal purchase order by Graver to Mosher which Wilson had negotiated. (R.T. 911).

On Friday, October 13, 1961, Wilson went to Dallas and negotiated with Mitchell all of the terms, prices and conditions of a contract for the fabrication, furnishing and delivery of steel by Mosher for the Tucson job. Wilson told Mitchell and Burton (who was Plaintiff's Vice President in Charge of Production), that a Graver Purchase Order would be forthcoming (R.T. 188, Wilson) (R.T. 247, Burton). Burton testified that Mitchell asked Wilson who the order would be entered to and Wilson said that it would be entered to Graver because he knew that Mosher would not accept the credit of Denver Steel & Iron or IMI. (R.T. 247)

Mitchell, on October 13, called Moore (Plaintiff's Treasurer and Credit Manager), and Moore approved the credit of Graver (R.T. 248-9).

Wilson departed Dallas and on the following Monday, October 16, 1961, Mitchell reduced to writing the agreement which had been made on October 13, referring to such oral agreement and memorializing it. This letter incorporated the fact that the agreement of Mosher had been with Graver and that the letter would serve as an interim purchase order pending formal purchase order. The interim purchase order was prepared for the signature of Graver (Pl. 1). This letter reached Wilson in Denver, who signed it on October 20, 1961, and thereafter mailed it to the Plaintiff, who re-

ceived it on October 26, 1961. Wilson signed the interim purchase order for and on behalf of Graver. On October 16, Mitchell prepared the Plaintiff's shop order for the agreement made on October 13, and assigned it Mosher's No. 66109, showing Graver as the customer (Pl. 12).

Mosher began forthwith its performance under the contract of October 13, 1961, commencing with engineering (R.T. 251), and by October 23, 1961, the shop had commenced work on templates, and steel had begun to arrive from Graver in railroad cars sent Freight Collect (R.T. 285-6). This steel was stenciled "Property of Graver Tank and Manufacturing" (Wilson R.T. 181), and was owned by Graver (Harle R.T. 905) which was obligated to furnish certain raw steel to the Joint Venture under the contract (Middleton R.T. 573).

In the meantime, Harle had called Burton from Denver on October 19, 1961, and identified himself as Director of Purchases for Graver, made complimentary remarks about Mosher's ability and dependability, told Burton that he had a copy of the October 16 letter (Pl. 1), that he was in agreement, and that a Graver purchase order would be forthcoming as soon as he could get some of the more pressing problems out of the way (R.T. 253).

In the restricted direct examination of Mr. Harle on the stand, Harle was asked whether he had made the statement Burton had ascribed to him "in words or in substance", that he was familiar with the company, that it operated along the lines of Graver, that he had a copy of the letter Mitchell had written, that he was in agreement, and that a Graver purchase order would be forthcoming. The witness Harle denied having made any of the above statements in words or in substance. Upon cross-examination, however, Harle admitted:

1. He had known about Mosher Steel before the conversation and knew of Mosher as being a very large

and reputable fabricator in Texas, described by the witness as "they were excellent" (R.T. 909);

2. That at the time when he called Burton on October 19, he had seen a copy of the October 16 letter (Pl. 1) and knew that a formal Graver purchase order was expected (R.T. 910-11).

From the above, it may be readily inferred from the cross-examination of Harle, that Harle did indeed tell Burton that he was familiar with Mosher, which he was, that his information was laudatory, which it was, and that he had seen a copy of the October 16 letter, which he had. Further, since, on October 19, 1961, Harle knew all the terms of the October 16 letter, including the fact that it was an interim purchase order with Graver and that a formal purchase order from Graver was to be forthcoming, it is not difficult to believe that Harle indeed told Burton all of the things which Burton ascribed to him in that conversation. In any event, if Harle was not in agreement and did not intend that a formal Graver purchase order would be forthcoming, he did not so inform Burton. On the contrary, he insisted, over Burton's objections, that Burton come to Denver to sit down with him and the material people to work out the problems related to shipping steel to Mosher from the mills at Chicago and the re-shipping of materials which were already in Denver (R.T. 254).

Pursuant to Harle's request, Burton went to Denver and met with Harle and Wilson on October 23 (R.T. 255). In this conference the October 16 letter (Pl. 1) was the basis for the conference and was gone into in detail (R.T. 255 and 257).

In that conference in Denver, Harle told Burton that the October 16 letter would serve as an interim purchase order until a formal purchase order could be sent to Mosher by Graver, and further informed Burton that Wilson had signed the purchase order and had returned it to the Dallas office

of Mosher (R.T. 257). Harle also told Burton that it might be two or three weeks before the formal purchase order would be received (R.T. 258).

There is no denial in the record by Harle of any of the facts related by Burton relative to the October 23 meeting in Denver, or to the fact that the October 16 letter was the basis of the conference and was considered in detail at the conference, except that he denied ever telling Mosher that he, Harle, would give them a purchase order (R.T. 945).

Wilson confirms Burton's testimony relative to the fact that the October 16 letter (Pl. 1) was the "basis of setting up everything", and that Harle, Burton and Wilson went over every item of the entire letter, and Wilson confirms that Harle assured Burton that a purchase order would be forthcoming (R.T. 197).

Wilson sent copies of the October 16 letter to Graver, Tucson; IMI, Los Angeles; and possibly Graver, Chicago. He also gave one to Harle (R.T. 194).

That Harle was familiar with the October 16 letter (Pl. 1) by October 18, and that Harle had commenced acting thereon on that date is shown by a document (Jt. 60) dated October 18, 1961, signed by Harle, informing Mosher of the procedure on shipments to Mosher and referred to Mosher's Order No. 66109, which number had originated with Mitchell and been communicated *only* in the October 16 letter (Pl. 1) or verbally to Wilson in Dallas on October 13 (R.T. 96 through 98).

A copy of the October 16 letter (Pl. 1) reached R. R. Branting, Senior Contracting Engineer for Graver in Chicago, and Branting thereupon wrote Lancaster a letter (Union E) in which he expressed surprise that a purchase order was to be forthcoming from Graver, and that Denver Steel and Iron Works had or was to sign the October 16 letter on behalf of Graver, and asked that a procedure be

set up to avoid duplication (R.T. 511). Branting admitted that he questioned the authority of Wilson only because Graver's general procedure did not authorize persons who were not employees of Graver to sign on behalf of Graver, and that he did not know whether Wilson had been authorized outside of the general procedure or not (R.T. 534-5).

Despite full knowledge of the October 13 agreement, and the interim purchase order, no one of the interested persons of Graver, to-wit, Harle, Lancaster or Branting, or anyone else, informed anyone representing the Plaintiff or Mr. Wilson, the agent, (R.T. 198, 199) that Wilson was not authorized to enter into the agreement on behalf of Graver, and Mosher, relying on said agreements, proceeded with the work, so that at the time when the IMI-Ward Joint Venture purchase orders were accepted, Mosher had expended or become obligated in excess of $40,000 on account of its performance under the October 13 and 16 agreements (R.T. 287).

All of the testimony and evidence in the record supports a finding that Wilson was the agent of Graver in making the contract of October 13 and in signing the October 16 letter, which memorialized the agreement of October 13. Wilson's express authority from Lancaster is not disputed. The authority to sign the letter of October 16 follows from the authority to make the agreement of October 13 because the letter of October 16 merely memorialized the agreement of October 13.

In addition, all the other facts and circumstances surrounding the transaction confirm the agency, as follows: a. The agreement with Mosher was instigated and ordered by Graver; b. Graver's credit was dedicated to the contracts which were placed in other hands at Graver's insistence; c. The letter of intent between Graver and the Joint Venture

provided that the cost of Graver supplied materials would be deducted from the contract price to the Joint Venture; d. S. A. Wilson had previously procured steel for the missile bases for Graver and in so doing had been authorized to commit, and had many times committed, that a Graver purchase order would be issued therefor; e. Graver shipped to Mosher freight collect, raw steel owned by Graver with its name stenciled thereon *which was at all times owned by Graver* and which it was under obligation to furnish to the Joint Venture under the contract with it; f. Harle, who was the Director of Purchases and would likely have issued a formal Graver purchase order reviewed the October 16 letter and discussed it with Burton of Mosher and Wilson and confirmed to both of them that a formal purchase order would be issued within a few weeks and further confirmed at the October 23 meeting with Burton in Denver that Wilson had signed the October 16 letter and sent it to Mosher; g. Harle, under these circumstances took no issue with Wilson's authority, either with Wilson himself or with any representative of Mosher, despite the fact that he knew that both Mosher and he, himself, were, at the time, performing the agreement by work done by Burton and others of Mosher and by the forwarding of materials to Houston; h. Neither Branting nor Lancaster, after full knowledge that Wilson had acted as Graver's agent, ever disabused Wilson, the agent, nor Mosher of Wilson's authority to so act.

The above facts not only establish Wilson's agency, express or implied, but constitute, at the very least, a ratification thereof by Graver with full knowledge, and, when coupled with the reliance by Mosher thereon to its detriment, estops Graver to deny the agency.

The trial court, in its Findings of Facts Nos. 16 through 28 (R. 1225-1228) has found as true the facts set out above upon which, it is submitted, a contract between Mosher

and Union existed prior to November 15, 1961 for the work to be performed for the Davis-Monthan job in Tucson. Such findings are supported by the overwhelming preponderance of the evidence. As to Davis-Monthan, the terms of the contract embodied in Jt. 9 between Mosher and IMI-Ward are identical with the terms embodied in PL 1 between Mosher and Union, and Jt. 9 refers to the oral agreements which resulted in PL 1.

Thus after October 16, 1961, Mosher continued to perform under the October 16 letter (PL 1) and the understandings reached at the October 13 meeting in accordance with the procedures set forth at the meeting with Harle in Denver on October 23 and the letter of October 18 from Harle to Mosher (Jt. 60) which had set forth procedures to be followed.

First Appearance at Mosher of the Joint Venture:

On October 31, 1961, Wallace Orr, who was "Director of Contracts for the IMI-Ward Joint Venture" (R.T. 786.) and William Holmes, Manager of Construction for the IMI-Ward Joint Venture (R.T. 791) came to Houston to see Mr. Burton, Vice President of Mosher Steel. Their coming was unannounced, insofar as Mosher was concerned. (R.T. 261.)

Prior to their coming to Houston, Mr. Morton, Manager of the Joint Venture, had given Orr a copy of the October 16 letter (Pl. 1) (Union's QQQQ), and Morton told him to go to Houston to "negotiate a contract or a subcontract between the Joint Venture and Mosher for the protection of both parties." (R.T. 791.) On October 23, the subcontract between Union and the Joint Venture had been executed. This date, of course, was subsequent to the October 13 meeting in Dallas between Wilson and the plaintiff, and subsequent to the October 16 letter. In Houston, Holmes and Orr met with Burton and then came to Dallas to talk with

Mitchell. At that time, Orr pointed out that he was negotiating for and representing the Joint Venture of Idaho-Maryland Industries, Inc., and Ward Industries Corporation. (R.T. 795.)

Orr was not entirely sure whether Mr. Moore or some other representative of the Financial Department of Mosher had met with him and Holmes in Dallas. Moore did however testify that he had been called from Dallas by Burton while he (Moore) was in Houston, asking whether Moore would accept the credit (R.T. 354) of IMI-Ward for the reason that *Holmes and Orr had requested that Mosher change the order from Graver to IMI-Ward "as it would be more convenient for accounting purposes."* (R. T. 353.) Moore told Burton that he would accept a purchase order from IMI-Ward "providing that Graver would be responsible for payment" (R.T. 354).

Burton testified that Holmes and Orr arrived in Houston unannounced (R.T. 261) and asked how Mosher was getting along with the Tucson job and asked if Mosher could fabricate a $20,000.00 addition for Vandenberg (R.T. 809). Burton told them he would try to interweave the Vandenberg job in with the Tucson job (R.T. 261). When Holmes and Orr asked about the price for the Vandenberg Job, Burton suggested that they accompany him to Dallas to talk with Mitchell, in whose department matters of price would come (R.T. 262). They came to Dallas and met with Mitchell.

During the course of that meeting, Holmes and Orr raised the question about changing the customer from Graver to IMI-Ward. Holmes and Orr told Burton and Mitchell that they wanted Mosher to deal with IMI-Ward because:

> ". . . it would be much easier and simpler for them, from the accounting standpoint, to have us accept an IMI-Ward purchase order." (R.T. 264).

Mr. Burton, from Dallas, then called Mr. Moore in Houston asking whether Moore would accept an IMI-Ward Purchase

Order, and Moore told Burton he would accept such a purchase order:

> ". . . as long as Graver would be responsible for payment." (R.T. 264)

Burton then informed Holmes and Orr of what Moore had said relative to accepting the IMI-Ward Purchase order and the Graver responsibility for payment (R.T. 265).

Mitchell confirms the fact that Holmes and Orr advised him that the formal purchase order from Graver would foul up the Joint Venture bookkeeping (R.T. 85) and that it would complicate the bookkeeping, and they asked whether Mosher would accept a purchase order from the Joint Venture in lieu of the formal Graver purchase order (R.T. 85).

Mr. Mitchell identified *plaintiff's Exhibit 32*, as being *notes* which he had *made on October 31* during the meeting with Holmes and Orr, that he asked them the customer's name and it was given as Idaho-Maryland Industries, Inc., and Ward Industries Corp. (R.T. 88), and that they told him that they represented the Joint Venture of Idaho-Maryland Industries, Inc. and Ward Industries Corp., and asked acceptance of a Joint Venture purchase order (R.T. 89).

Mitchell also confirms that he told Holmes and Orr that the acceptance of the changed purchase order on Tucson and the acceptance of an order for Vandenberg was dependent upon credit approval by Mr. Moore, and that Burton called Moore in Houston and heard Burton advise Holmes and Orr that Mosher would not accept a Joint Venture purchase order unless Graver assured Mosher of payment of all invoices (R.T. 90). Holmes and Orr then informed Mitchell and Burton that they (Holmes and Orr) would check into the matter and let Mosher know (R.T. 90).

Mitchell did not enter any change in the shop order for Tucson, nor did he enter any shop order for Vandenberg at

that time (R.T. 90-91). The Tucson shop order was changed and the Vandenberg shop order entered *on November 16, 1961.* (R.T. 92-93).

On November 13, Orr called Mitchell and again requested that Mitchell accept the Joint Venture purchase orders and Mitchell again stated to Orr that they would have to be cleared with Mr. Moore of the Credit Department who was then in Lubbock. (R.T. 91).

The purchase orders (Jt. 9 and 10) were received by Mitchell in Dallas on November 10, 1961 (R.T. 96), and were retained on his desk *until the credit was approved on November 16,* at which time he forwarded the purchase orders to Houston where they were received on November 17. (R.T. 440).

As a condition of the acceptance by Mosher of the IMI-Ward purchase orders for Tucson and Vandenberg, Graver became obligated to pay Mosher directly for the fabrication, furnishing and freight costs done, delivered and incurred by Mosher for both the Tucson and Vandenberg jobs.

From the very beginning on October 31, 1961 when Holmes and Orr requested that an IMI-Ward purchase order be accepted by Mosher for the Tucson and Vandenberg jobs, Mr. Moore, Mosher's Treasurer and General Credit Manager, refused to permit the acceptance of the purchase orders unless Graver would agree to pay Mosher for its work, materials and freight charges. This requirement was first made on October 31, 1961 and was finally fulfilled on November 15, 1961. Mr. Moore's testimony on the subject is entirely consistent. It is not a simple matter of Moore saying one thing, and Page saying another. Moore's testimony is logical, entirely consistent, supported by other testimony and documents and given at length on the witness stand without any restriction on direct examination or upon cross-examination.

The testimony of Mr. Moore relative to the conversations leading up to and including the agreement of November 15 with Page of Union is as follows:

1. On October 31, 1961, to Mr. Burton, in response to the request of Holmes and Orr that the order be changed from Graver to Idaho-Maryland-Ward Industries:

> "A. I told him we would accept it providing that Graver would be responsible for payment." (R.T. 354, lines 2-3).

2. First Moore conversation with Page: On *November 7*, 1961, in Burton's office, Moore told Harle:

> "A. . . . I told him I would release it when we got confirmation about the responsibility of Graver to pay for the material." (R.T. 355, lines 1-2).

3. On November 7, 1961, in Burton's office, Harle told Moore:

> "A. . . . that we should get in touch with one person that could give us assurance, and that was Mr. John Page of Chicago." (R.T. 355, lines 5-7).

4. During the November 7, 1961, telephone conversation to Page, Harle told Page:

> "A. He said the shipments would be held up unless we could get assurance for payment of the material." (R.T. 355, lines 17-18).

5. Moore then talked to Page on the telephone as follows:

> "A. I told Mr. Page we would have to have assurance, that if we were not paid within the terms of the sale that they would be responsible for paying Mosher Steel Company." (R.T. 355, lines 22-24).

6. Page responded to Moore:

> "A. Mr. Page said he was not in a position to carry out my request without the approval of Mr. Morton, Manager of IMI-Ward Industries, Joint Venture." (R.T. 356, lines 3-5).

7. Moore then said to Page:

"A. I asked him if he would get in touch with Mr. Morton and he said he would and I would hear from him." (R.T. 356, lines 7-8).

8. Harle then spoke to Page, saying:

"A. . . . he was glad we could get something worked out on it." (R.T. 356, lines 24-25).

9. On November 13, 1961, Orr called Moore at Lubbock and in this telephone conversation:

"A. He asked that we accept the order strictly on the credit of IMI-Ward Industries for shipment of the material." (R.T. 358, lines 1-2).

10. Moore responded to Orr:

"A. I said that we would not accept it on that basis." (R.T. 358, line 4).

11. After additional requests by Orr and refusals by Moore, in the November 13 telephone call, Orr asked Moore if he would talk with Mr. Morton. Mr. Morton then got on the telephone, and Morton said:

"A. He asked the same as Mr. Orr, that I accept the order strictly on the credit of IMI-Ward Industries." (R.T. 359, lines 22-23).

12. Moore responded to Morton:

"A. I told him we would not accept it on that basis." (R.T. 359, lines 25).

"A. I asked him if he had spoken to Mr. Page and he said yes, that Mr. Page had called him in reference to the order. And I told him we would request and continue to request and asked him to get in touch with Mr. Page and give his approval of having them pay for this work." (R.T. 360, lines 2-6).

13. Morton responded to Moore:

"A. Well, he said if that was the only way we would accept it, he would have to give his approval." (R.T. 360, lines 8-9).

14. On November 15, 1961, Harle was requesting that shipments be made and Moore had not yet heard from Page on the responsibility for the payment of the material. Moore therefore called Page on November 15, 1961. (R.T. 360, lines 17-25).

15. Second Moore conversation with Page. Mr. Moore called Mr. Page in Chicago late in the afternoon of November 15, and said to Mr. Page:

> "A. Asked Mr. Page if he had gotten clearance from Mr. Morton on the responsibility of Graver making payment for the material that we were fabricating for them." (R.T. 361, lines 6-8).

16. Page responded as follows:

> "A. He said that he had received such okay from Mr. Morton for them to make payment for the material." (R.T. 361, lines 10-11).

17. Page further stated:

> "A. He stated the payment would be made direct and any deduction made from the contract IMI-Ward contract." (R.T. 361, lines 14-15).

and

> "A. He said Mr. Morton had proved that method of handling payment." (R.T. 361, lines 17-18).

18. Page further stated:

> "A. He said that he would write me a letter in a day or two giving final approval on this agreement." (R.T. 361, lines 20-21).

19. In further exposition of the conversation with Page, Moore testified:

> "A. . . . I did tell Mr. Page that we were practically ready to make the first shipment on this and we had to have something definite about the payment for the fabricated material. And I asked him if he had gotten approval from Mr. Morton for them to pay us direct

> and deduct it from the contract. He said that he had talked to Mr. Morton and Mr. Morton had given him approval. And he stated that he would write me a letter in a day or two giving, outlining this agreement by Mr. Morton for the payment of the material." (R.T. 362, lines 5-14).

Insofar as the testimony of Mr. Page can be understood, Mr. Page testified that at the time when he engaged in the conversation with Mr. Moore he was then the Controller of the Graver Division of Union Tank Car Company and that his duties as such were "the financial responsibility, everything that a controller normally does, everything that a treasurer normally does," for the East Chicago and Salt Lake City plants of Graver and the various jobs Graver was doing throughout the country. (R.T. 694). Mr. Page was placed on the witness stand in the afternoon of December 1, 1964. During that afternoon session he testified that he had read the two depositions which had previously been taken of his testimony (R.T. 694-695) and testified that he *first* talked with Mr. Moore on "approximately November 15, 1961" (R.T. 696), that Harle had called him and put Moore on the phone from Houston (R.T. 696), that Moore wanted a guarantee of the payment of the steel that was being shipped to IMI (R.T. 697), that he told Moore he was not in a position to give a guarantee of the entire contract (R.T. 697) and then told Moore that he would guarantee the payment of one shipment that was ready to go which he had discussed with Mr. Moore as being a $16,000 value. (R.T. 697 and 698).

Page admitted that he had told Moore that he would send him a letter (R.T. 699).

After this conversation with Moore on November 15th, Page testified he prepared and sent a telegram to Moore, (R.T. 699) (Jt. 22), and that thereafter he never talked with anybody at Mosher. (R.T. 701).

On the afternoon of December 1, 1964 Page did not recall talking to Moore on November 7, 1961. (R.T. 701). He first admitted that Moore wanted Graver's guarantee on Mosher's shipments to IMI-Ward (R.T. 705) but then immediately, in response to an identical question by Graver's counsel as to whether Moore had said he would have to have assurance that Graver would be responsible, he answered "No". (R.T. 706).

Page denied telling Moore that he would have to obtain the approval of Morton, that he never did consult with Morton and never told Moore that he had gotten a clearance from Morton. (R.T. 706-707).

Page admitted that he had told Moore he would write Moore a letter in the wire (R.T. 707) but not on the telephone. (R.T. 707). This, of course, contradicted his testimony at R.T. 699 that he had told Moore on the telephone that he would send Moore a letter.

Page then testified that he called Vernon John two or three times a week and had called him on November 2, at which time he, Page, had told Vernon John of the request and that John had told him that someone in John's office had told him that Mosher was no longer asking for this "guarantee." He also told Mr. John that he did not have authority to guarantee, unless John gave his permission. (R.T. 709-719).

The flavor of the Page testimony can be gleaned in part from the questions on page 710 of the reporter's transcript in which he, the financial man for Graver, first stated that he did not think he had any knowledge of how the invoices which were issued on the work at Tucson were being paid. This answer caused counsel for Graver to ask Page if he had ever heard of United California Bank. After this question he testified that he did know all about how the invoices were being handled and his memory was excellent.

He remembered writing a letter to the effect that he was "generally aware of the accounts receivable financing agreement" and he even remembered the names of the President and Vice President of United California Bank, whom he had met at a visit to the bank. (R.T. 713-714). With respect to Union LL and a question by counsel whether he remembered receiving it, after much doubt he finally said: "Oh, I think I—yes, I'll say that I can say that I did." (R.T. 715-716).

Thus ended the testimony on December 1st.

On the morning of December 2, 1964 Mr. Page resumed the stand and immediately changed his testimony of the previous day (and the testimony contained in his two previous depositions) and was now convinced that the *only call* he received from Mr. Moore was on November 7th rather than November 15th. (R.T. 722). It later developed that the change in Page's testimony resulted from a discussion with counsel in the presence of Harle on the night of December 1st, in apparent violation of the court's order sequestering witnesses. (R.T. 52)

Page now remembered that he had received a TWX from Harle dated November 15, 1961 and that he had sent the telegram after receiving the TWX from Harle. (R.T. 723, 725, Jt. 45).

Next Mr. Page attempted to explain the second sentence of the wire of November 15th (Jt. 22) as referring only to the details of the first sentence, which had to do with a guarantee of November 16th shipment (R.T. 725), but he admitted he never sent a letter with those details because there was no follow-up and he wasn't sure it was necessary. (R.T. 725). This was the first time in three separate stints at testifying in which Page had attempted to refer the second sentence of the telegram to the first sentence thereof. In his previous testimony, as will be pointed out, he

conceded that *the letter mentioned in the second sentence would have been relative to the entire account* if he had sent it.

All of the above resulted from the direct examination of Mr. Page by Graver's attorney.

Cross-examination ensued. In that examination Page admitted that Mr. John would have to agree if Graver were to withhold money to pay Mosher. (R.T. 730).

Next Page stated that while his mind had been put at ease on November *2nd* by his conversation with Mr. John he became aware on November *7th* that Mr. Moore wanted a guarantee. (R.T. 732). He then imputed to Mr. Moore a statement *on November 7th* that Moore had a $16,000 shipment setting on the dock and that he told Moore he *would think* about guaranteeing payment of that shipment. (R.T. 732). He had previously testified that he had told Moore he would guarantee the first shipment. Of course, all of the other testimony, including Mr. Harle's, makes it impossible to believe that Moore said on November 7th that he had a $16,000 shipment setting on the dock, in view of the fact that on November 7th when Harle came to Houston the work had not progressed to the point where any shipment was at all imminent. Page said he probably told Moore that he would write Moore.

Page said that Harle called him on the 15th and sent the TWX in confirmation of his phone call and that Jt. Ex. 45 reflected the conversation. (R.T. 733). He admitted that Moore wanted a guarantee of the entire account and that is what Moore asked for on November 7th. When asked if the entire account is what Page told Moore the letter would be about, there was an interesting series of answers, (R.T. 734) in which the answer to the question was avoided by saying that the contents of the letter were unknown, that he said he would send Moore a letter after he had checked

up on it, and that the letter was not necessarily responsive to Moore's request for a guarantee of the entire account because "the letter might have said no, I won't guarantee it." (R.T. 734).

At this point the witness admitted that his reason for changing the date of the conversation with Moore from the 15th to the 7th was that Harle was not in Houston on the 15th and that he had discovered that fact the previous night. (R.T. 736).

Next ensues a series of questions and answers in which the witness first said he *did not ask* Vernon John to send a letter authorizing deduction from the Joint Venture to pay Mosher (R.T. 736), that he *did* discuss the matter with Vernon John, however, (R.T. 736), that he didn't know whether Jt. Ex. 26, (the Vernon John letter dated November 13, 1961) was responsive to that discussion (R.T. 737) because the letter didn't get to the office until after he had left, *but finally*, recognizing that the letter was not received until after he had left Graver, *he admitted that the Vernon John letter was what he, Page, had asked Vernon John to send him.* (R.T. 737). Again, on R.T. 738, he testified that he didn't know whether he asked for the Vernon John letter (Jt. 26) specifically, but that he did ask Vernon John for something in that nature.

Page said he asked no permission before sending the November 15th telegram and that no one had ever questioned his right to send it. (R.T. 739). He never sent a copy of the telegram to Branting (R.T. 739) but probably sent a copy to Feurt.

With respect to the $16,000 value placed on the first shipment, Page said that Harle could have mentioned the figure as well as Moore on November 7th. (R.T. 741).

Then Mr. Page was referred to his first deposition in which he had testified that Mr. Moore wanted a guarantee

by Graver of the entire account and that on that subject he told Moore he would write Moore a letter, and that right after the conversation with Moore he sent him a wire confirming the conversation. (R.T. 743). He then testified that he did not think the wire confirmed the conversation. (R.T. 745). He then avoided answering direct questions about what the letter was to be about, saying: "I don't know. I never wrote the letter." (R.T. 746). Then his testimony upon deposition was read to him in which he said he had told Moore that he would write Moore a letter about the *entire job.* (R.T. 746-747). He was then asked if that was his testimony and he finally answered "Well, that's—yes, that's ". (R.T. 748). He then said he did not write the letter because there was no follow-up, but of course he admitted receiving a telephone call and TWX from Harle on November 15th and that in the telephone call he "may have" told Harle that he would write the letter to Mr. Moore immediately. (R.T. 749).

At R.T. 750 he then admitted that he worded the wire of November 15th very carefully because he wanted to guarantee the one payment and he didn't want the wire to be misleading (R.T. 750) but in the next breath he indicated that he wanted to indicate in the wire that there was a letter coming on the whole account. (R.T. 750).

Upon being referred to his previous deposition in which he stated that he had told Russell Moore he would write a letter about the whole account (R.T. 752) he stated that that was also his present testimony.

He was then referred to his testimony upon deposition in which he said that the only way in which he recalled the exact date of a conversation with Russell Moore was the fact that he had sent a telegram promptly after the conversation. (R.T. 753).

The witness was then read his testimony upon previous deposition in which he had admitted that the second sentence of the telegram referred to a guarantee of the entire account. (R.T. 754). He said this was also his present testimony.

The witness was next referred to his previous testimony in which he had said that Harle had told him of the problem of the Mosher guarantee prior to November 15th and that one of the problems was credit and that Harle had referred the problem to him and that he would be called upon to resolve it and that he knew all of this before November 15, 1961 (R.T. 757), that he thought about the matter and did not want to guarantee the contract (R.T. 758) but told no one, including Moore, despite the fact that he said he had already made up his mind that he was not going to guarantee the whole account. (R.T. 759).

By reading some of the previous depositions, Graver's counsel sought to infer that after November 15th Page had talked to Vernon John and that Vernon John had assured him there was no further necessity for the guarantee. Upon cross-examination, however, Page remembered the conversation referred to in Union's Ex. K on November 2, 1961, but did not remember what any of the other conversations between him and John had been about (R.T. 777).

Page was further questioned with respect to the assurance by Vernon John that Mosher was no longer requesting a guarantee and finally admitted that that assurance came to him from Vernon John *no later* than November 2, 1961 (R.T. 780) and that he *discovered on November 7th* that Mosher wanted Graver to be liable for the entire account (R.T. 781) and that whatever Mr. John had told him previously had gone by the boards.

This was the end of Mr. Page's testimony.

The testimony of Mr. Page has been recited in detail because it is submitted that his testimony changed not only from deposition to the witness stand, but even changed from one minute to the next during the hours which he spent upon the witness stand. He attempted to avoid answering direct questions, the answers to which were detrimental to Graver's case, and would only confess the detrimental answers after being confronted with his testimony upon deposition. In his depositions, Mr. Page was willing to confirm certain facts about which Mr. Moore and others had testified, reserving his denials, more or less, to the contention that he did not say to Mr. Moore what Mr. Moore had said Mr. Page had told him. On the stand, however, he went so far as to deny even things which he had not denied before and to confuse the issues so completely that it is impossible to obtain even a coherent resume of his testimony. Some of these answers, reluctantly given, confirm the testimony of Russell Moore, but most of them are a hodgepodge of contradictory statements which make no sense standing on their own and are completely at odds with other testimony in the record and with a dozen written documents which are in evidence.

In short, it is submitted that it is impossible to believe Mr. Page and at the same time to believe one's own eyes.

Almost without exception the testimony of the other witnesses in the case and the many documents in evidence absolutely confirm Mr. Moore's statement of Page's agreement, and Page's denial stands alone and makes absolutely no sense in the light of the whole record.

The testimony of Mr. Harle, Graver's Director of Purchases, was truncated due to the fact that Graver's attorneys determined, for reasons best known to themselves, that Harle's testimony should be restricted to saying that certain statements that were made by Mosher's witnesses were not

true. One of these statements had to do with what Harle had told Burton, Mitchell and Moore at a meeting in Dallas on February 16, 1962, as follows: "That you had contacted Mr. O'Boyle, and Mr. Browder and Mr. Jones and told them you were going to pick up the invoices and go over the final billings and proceed from there to IMI's office in Los Angeles and be sure everyone was in agreement, and you were going to take the matter from there to Chicago and see that Mosher got their money promptly." (R.T. 880). Harle was asked whether he had said that in word or in substance and replied "No, sir."

At the beginning of his cross-examination Mr. Harle emphatically denied that he had checked with O'Boyle, Browder or Jones before coming to see Mosher on February 16th. He then, however, admitted that he had told Jones that he was going to Dallas but he didn't remember whether Jones had told him that O'Boyle and Browder had told him to go ahead. (R.T. 889). He further denied telling Moore, Mitchell or Burton in Dallas on February 16th, either in words or substance, that "there's no question about the responsibility for payment of this work, and that there was an agreement that Graver would compensate Mosher and that you (Harle) would so testify in any place to that effect." He did admit that he came to get the invoices. (R.T. 893). Harle stated that he had received Union's Ex. P, the memorandum from Wright to Harle (R.T. 895), and said that it was responsive to Jt. 28 which he had written to Wright. (R.T. 896). Harle admitted that he knew Vernon John had written the letter (Jt. 26) (R.T. 902-903) *and that he had seen a copy of it on November 14, 1961.* (R.T. 903-904). He admitted, after being shown Jt. Ex. 50, that Page had told him that he (Page) would take care of the problem of securing a release to the manufacturing division of Mosher to release the shipment. (R.T. 913). He then denied knowing that Mosher was demanding a guarantee

on the entire job (R.T. 913) and stated that when he called Mr. Page from Mr. Moore's office on November 7th he knew Mr. Moore had problems but did not know what they were. (R.T. 914). However, he knew that the problem was credit and that Mr. Page was the man who could take care of Mr. Moore. (R.T. 914).

On that date (November 7, 1961) there was no shipment ready to go, "there was practically no fabrication started, sir, a little, not too much." (R.T. 914).

At this point Mr. Harle stated that he *deliberately left the room* after introducing Moore to Page on the telephone on November 7th, and did not hear what Mr. Moore said to Mr. Page. (R.T. 915). His reason for leaving the room was "because I, would you say, wanted no part of it." Of course, Mr. Harle admits that he was definitely concerned with getting the job done, inasmuch as he was the expeditor and Moore and Burton testified that Harle remained in the room at the desk alongside Moore. Under the circumstances, the trier of the facts can, and perhaps has, determined whether Harle, in fact, left the room, which is incredible in view of his position as Director of Purchases, and the fact that he was a vigorous expeditor and anxious that the credit matter be resolved. His exit from the room, of course, removed Harle's ear from contact with one of the two or three important conversations involved in the suit.

Harle was referred to his deposition in which he had said that he had the impression that Mr. Page and Mr. Moore had an agreement. (R.T. 916). His impression was based in part on the fact that shipments came to the sites (R.T. 917), that he knew something had happened to permit shipment to come forward. In his previous deposition at R.T. 920, he was asked if, on February 16th, 1962, Harle had the impression that Page had taken care of the matter with Mosher. He answered as follows: "With a qualification, if

you will accept it. I could see how I could have that impression, because Page said he would take care of those shipments and they did come forward. *The whole thing was completed.* It is entirely possible I had that impresssion." (R.T. 920). And upon the question whether he had so informed the Mosher people at the February 16th meeting, he answered "It is entirely possible I did."

When confronted with Jt. Ex. 61 in which Harle had written to Wright on *November 30, 1961* "You may recall that Mr. John worked out an arrangement with Mr. Page of Graver and Mosher Steel for payment of the invoices when due", he tried to indicate that the past tense "worked" really meant "was being discussed and tried to be worked out."

Harle testified that after checking the invoices with Mr. Wright, after February 16th, he agreed with Wright that *Mosher's work had been completely and properly performed.* (R.T. 923-924)

Mr. Harle stated that he had discussed the Mosher credit matter with Mr. John prior to November 15th (R.T. 1027) and that Mr. John had told him that he (John) had written to Mr. Page (R.T. 1027), that he had seen the Vernon John letter to Mr. Page during the same visit to Los Angeles (R.T. 1029) and that he had received a copy of the letter (R.T. 1032).

On November 14, 1961, Harle had seen a copy of a letter from Vernon John to John Page "requesting Graver write Mosher Steel guaranteeing payment of D. S. & I. order." (Jt. 25). The next day, after talking with Page about the specific matter of the requirement of Mosher that Graver be responsible and the agreement thereto by Graver, Mr. Harle, from Tucson, wrote Mr. Burton a letter dated November 15, 1961 (Jt. 50) in which he said "I spoke to John Page and he agreed that the letter should be in Mr. Moore's hands today or tomorrow." Then, knowing that the

last requirement by Mosher had been met, to-wit, the agreement by Graver to pay, he proceeded to give detailed instructions to Burton with respect to the method of handling the shipments. (Jt. 50.)

It is submitted that, even on the restricted examination in which Graver's attorneys indulged, the witness Harle was substantially impeached and it may be concluded that he did indeed make the statements attributed to him by Moore, Burton and Mitchell at the February 16th meeting in Dallas and that his testimony relative to walking out of the room is incredible and clouds Harle's testimony on any point where Graver's interest could have been prejudiced.

Further, it is quite clear from the things which he did, to-wit: the letters he wrote and TWXs he sent, that Harle knew that Page had agreed that Graver would be responsible, and confirm Moore's testimony on the subject.

In addition, Mr. Moore's testimony is substantiated by Mr. Branting, Graver's Senior Contracting Engineer, who first claimed he had closed his file on the Mosher matter on November 7, 1961, after receiving a TWX from Lancaster to the effect that Mosher was no longer to receive a purchase order from Graver, but upon cross-examination conceded that he had reopened it on the same date, changing the subject to guarantee, which had been referred to Mr. Page (R.T. 531) and that on November 7th he knew that Mosher was seeking a guarantee of payment despite what the November 2nd Memo (Union K) had said about the conversation between Page and John on November 2nd. (R.T. 536-537). Branting then stated that he had heard nothing about the Mosher account between November 7, 1961, and sometime in 1962. When confronted with Jt. Ex. 26, however, he conceded that he had attempted to find a letter from Vernon John to John Page sometime *prior to the 6th of December* and that he was looking for a copy of

the letter which had been showed him a few moments ago. (Jt. 26) (R.T. 539-540). Branting did not see Graver's copy of the telegram from Page to Moore (Jt. 23) although he said he should have received a copy of it (R.T. 531), in view of the fact that his duties were to act as a focal point of information for contracts and subcontracts of the Graver Division, to be a liaison man between Graver and its subcontractors, Graver and its prime contractors, and to maintain a file of records, all documents particular to the job to which he was assigned, including the Tucson contract. (R.T. 504).

Mr. Moore's testimony is further confirmed by the testimony of Mr. George Morton, the President of IMI, and the Manager of the Joint Venture. He testified that he saw the Vernon John letter (Jt. 26) shortly after it was written (Morton 2, p. 52, Pl. 40), and that it *constituted a modification* of the Joint Venture contract with Union.

George Morton further testified that the *Vernon John letter* authorizing Graver to pay Mosher and to deduct from the Joint Venture contract price *contained his understanding of the then situation and of what was to be done* (Morton 2, p. 29-30, Pl. 40 supra). Morton further said it was brought to his attention that Mosher was requiring a guarantee of the purchase order and that these arrangements had to be made *before they would accept the purchase order* (Morton 1, p. 27, Pl. 39).

Morton does not recall talking to Mr. Moore but said it was entirely possible that he may have. (Morton 1, p. 28 Pl. 39 supra).

Morton testified that Harle had informed him that Graver had guaranteed the payment of the Mosher account and that it was being handled by the Chicago office and that it would normally be handled by a Mr. Page (Morton 1, p. 30) Pl. 39 supra).

Vernon John, the financial man for the Joint Venture, and a member of the Joint Venture committee, confirmed Mr. Moore's testimony in testifiying that Wilson had told him that Mosher wouldn't deal with IMI without help from Graver and that IMI's credit was no good insofar as Mosher was concerned (pgs. 32 & 33 Vernon John Dep., Pl. 41). Further, he testified that he had sent the letter to Page because he knew he had to (Jt. 26) and that it must have been sent pursuant to discussions with Page. (Pgs. 34 & 35, Pl. 41).

On or about December 4, 1961, John left his office at Graver Tank, *never to return.* He was relieved of his employment *in a telephone call* to him while he was on a trip. (R.T. 740).

Two days *before* the November 15th conversation between Moore and Page, Vernon John had written a letter dated November 13th (Jt. 26) saying:

> "This is your authority to pay Mosher Steel invoices, which will approximate $225,000.00, after our acceptance of the work performed by this company.
>
> "This is also your authority to deduct the amounts of such payments from our joint venture contract price for the work on the Tucson and/or Vandenberg sites."

This letter (Jt. 26) was written on November 13th pursuant to Page's request (R.T. 737). A copy of it was seen on November 14th in Mr. Wright's office by Mr. Harle. (Jt. 25). Pursuant to his knowledge of the situation and his duties as Expeditor, Harle wrote Frank Wright, on November 30, 1961, a letter in which he said "You may recall that Mr. John worked out an arrangement with Mr. Page of Graver and Mosher Steel for payment of the invoices 'when due' " and asked Wright to check on the procedure so that the invoices could be paid "when due", saying "you know the first shipments were delayed a couple of days because of this difficulty."

Unaccountably, after Page's departure on December 4th, the letter from John to Page (Jt. 26) could not be found in the Chicago office of Graver and Ray Branting so informed Mr. Harle prior to December 6 (Jt. 25). Harle then sent a TWX (Jt. 25) to Frank Wright reminding Wright that he had seen a copy of the letter, telling Wright that the letter had not been found in Chicago by Ray Branting, and asking Wright to have Mr. John send another letter "*same date*, sign it, send to J. Page with copy to R. Branting. Can you mail 12-6-61?" (Jt. 25). Jt. 26, the letter of November 13th was marked received on December 11, 1961 in the office of John V. Page. It is important to remember that on that date Mr. Page had been fired and Mr. E. L. Feurt, who had been assistant to Mr. Page, was, on the 11th, the only one in the Controller's office and became assistant to the new Controller, J. P. Trytten, when Trytten assumed the office on December 12, 1961.

Mr. Feurt had known at least since shortly after November 7th that Mosher was seeking a formal guarantee from Graver and that the matter had been turned over to John Page. (Feurt Dep. Pl. Ex. 36, p. 398). In addition, he knew from Harle before November 15th that Mosher wouldn't make deliveries unless Graver would be responsible for payment. (p. 442-443, Feurt Dep. Supra). He had talked with Page about the matter and said that Page's discussion of the matter at that time left it unresolved. He wrote, on December 12th Jt. 24, which is a memorandum from Feurt to Mr. Trytten, in which he set up a preferred procedure whereby Graver would receive Mosher's invoices from Vernon John, the invoices would certify that the material had been received and was approved for payment, and Graver would pay Mosher directly. He set forth the estimate by Tom Harle of Mosher's invoices. Mr. Trytten obtained the approval of Clark Root, President of Graver, to handle the matter in this way and so wrote upon the memorandum. (Jt. 24).

Feurt then wrote a letter for Mr. Trytten's signature to be sent to Mosher. (Jt. 21). In addition, on December 12th he sent to Mr. McNabb, the accountant in the field, a memorandum of the agreement so that Mr. McNabb would be informed and would not pay twice. (Jt. 30, p. 460 Feurt Dep. Supra).

On December 22nd Mr. Harle, being concerned whether Mosher would stop work if they were not promptly paid, asked Frank Wright to check into the matter and to mail him the original invoices if Wright wanted Graver to pay them. (Jt. 28).

Wright responded on January 5, 1962 (Union P) that he was not clear why, but he had been told that Graver would not pay Mosher's invoices directly and for that reason he would like to put the Mosher order on a "Joint Venture requisition to Graver to insure prompt payment."

All of the above activity among Graver personnel occurred without any further contact from Mosher after November 15. True, Mr. Trytten, in his deposition, indicates that someone from Mosher called him on December 11th or 12th, and discussed with him a letter which was mentioned by Page in a telegram and that he searched for the letter but found only a telegram. (Trytten Dep. Pl. Ex. 36, p. 367). He did not remember anything further about the conversation nor with whom it was held. (p. 368 Trytten Dep. supra). The identity of the caller from Mosher, if there was one, remains a mystery.

It is not difficult to understand why Trytten, on his first day as Controller, delayed signing and sending Jt. 21 when Lancaster told him "steel shipments are not being held up. Proposes we guarantee only on a separate shipment basis if requested." (Jt. 24). It is interesting to note that while the record does not show that Mr. Trytten ever signed

Jt. 21, the record does show that the original letter was never destroyed but was carefully preserved in Graver's file.

The telegram of November 15, 1961, (Jt. 22) from Page to Moore is relied upon by the Defendant Graver to restrict the obligation of Graver to the November 16th shipment.

The fact is, however, that the preponderance, if not all, of the credible testimony and the evidence supports the proposition that the telegram was intended to, and did, confirm Page's statement to Moore that Graver would pay for the entire account. It must be remembered that the telephone call between Page and Moore on November 15th occurred late in the afternoon and that the telegram was sent at 5:23 p.m. on November 15th by John Page from Chicago, and did not arrive at Mosher's office in Houston until late in the evening of that day. It should also be remembered that on November 15th (not November 7th) there was a shipment which, it was hoped, could be sent on November 16th and that Tom Harle was very anxious that the shipment be made on the 16th "so it travels over the weekend" (Jt. 45) and that Harle's anxiety that the shipment be made on the 16th, before, rather than after, the upcoming weekend, had been communicated by Mr. Harle to Mr. Page in Jt. 45 on the same day (November 15) on which Mr. Moore talked with Mr. Page.

The testimony and evidence supports, and no credible evidence disputes, that in the telephone conversation between Moore and Page on November 15th: (a) Moore demanded that Graver be responsible for the *entire account;* (b) Page *admitted* that Moore was talking about the entire account; (c) Page told Moore he would write a letter in a day or two; (d) Page *admitted* the letter, had it been sent, would have referred to the *entire account* rather than to one shipment only, and (e) the second sentence of the telegram was *intended by Page* to refer to a letter which

would have concerned the *entire account* rather than one shipment, had the letter been sent.

Harle's TWX, the necessity of getting shipment on November 16th in order that it might travel over the weekend, and the fact that it was late in the afternoon of the 15th when the composing of a letter would have been difficult, certainly are common sense explanations for Page's telegraphic guarantee of the November 16th shipment. The second sentence relating, as the testimony shows, to the entire job, was absolutely redundant except to assure Mr. Moore that Page would, indeed, write the letter relative to the entire account. That is, the second sentence of the telegram confirmed the statement which Page had made on the the telephone prior to sending the telegram, to the effect that Graver would pay Mosher and that Page would write Moore a letter in a day or two confirming this fact.

With respect to the telegram of November 15, 1961, Moore testified:

> "A. . . . it indicated a letter was coming. I had already had assurance that the letter would be coming." (R.T. 364, lines 20-21).

Again, with respect to the telegram, Moore testified:

> "Q. You didn't pay any attention to it at all."
>
> "A. I paid attention to it that it said the fact I was to receive the letter in a day or two.
>
> "Q. That is what you looked at, was the part of it that said you were to get a letter in a day or two.
>
> "A. Yes.
>
> "Q. The reason you ignored the telegram was that you said in your deposition that, in the first place you hadn't asked for the telegram.
>
> "A. No, I didn't ask for the telegram.
>
> "Q. And, in the second place, you had Page's oral promise.
>
> "A. Yes, I had a promise for the entire order.

"Q. And you expected a letter from Mr. Page. The telegram says: 'early next week.' It says, 'early next week.' "

"A. Yes." (R.T. 413, lines 5-20).

"Q. Mr. Moore, admitting that there was an emergency in that the shipment was being held up, are you sure this wasn't to be handled by telegram?

"A. Not as far as I was concerned, it wasn't, because he made a commitment for the entire job and I don't know that—I wasn't expecting a telegram." (R.T. 414, lines 9-14).

With respect to the letter, Moore testified:

"Q. Then why did you ask for a letter?

"A. I don't recall that—he promised the letter and I don't know it was strict on my request he did. It was understood all the time from November 7th he was to give us this okay." (R.T. 414, lines 22-25; Tr. 415, line 1.)

"A. I understood all the time it was supposed to be a guaranty of the entire amount." (R.T. 415, lines 23-24).

and

"A. I had assurance from the very beginning, yes. I expected the entire amount to be guaranteed." (R.T. 416, lines 1-2).

and

"A. I expected a guaranty of the entire amount, when he made this commitment on the 16th." (15th) (R.T. 416, lines 5-6)

and

"A. On the 15th I had assurance from Mr. Page that the entire account was guaranteed." (R.T. 416, lines 15-16.)

While admitting that Moore's requirement that Graver be responsible went to the entire account; while further admitting that he told Moore he would send a letter relative

to the entire account; and while finally admitting that the second sentence in the telegram referred to a letter involving the entire account, Mr. Page nevertheless says that he did not know what would have been in the letter, that it might have turned Mosher down on its requirement as to the entire account, and that before talking with Mr. Moore or sending the telegram he had already made up his mind that he did not intend to write a letter guaranteeing the entire account.

It is submitted from the full record that *these latter statements of Page's are not credible*, but assuming that they were credible, it appears quite obvious that in view of Page's knowledge of what Moore was demanding, as admitted by Page, and second sentence "complete details will follow in letter early next week" were fraudulently conceived for the purpose of misleading Moore, to Moore's detriment, with knowledge that Moore would, in all probability, rely thereon.

Finally, there is no dispute whatever but that Mosher relied upon the commitment made in the telephone conversation by Mr. Page to Mr. Moore on November 15, 1961 (R.T. 445, lines 11 through 22), and that Mosher's performance and its acceptance of the IMI-Ward purchase orders was conditioned upon Graver's commitment and that such purchase orders were not accepted by Mosher until Graver's commitment was received.

Appellee submits that the other testimony and evidence in the record overwhelmingly confirms and supports the testimony of Mr. Moore that John Page, on November 15th, agreed with Mosher that Graver would pay Mosher *direct* for all of the materials fabricated and furnished to the Tucson and Vandenberg bases, and that IMI-Ward had given its approval that Graver pay Mosher direct and deduct the payments from the Joint Venture contract, and that the letter mentioned in the telegram and telephone con-

versation of that date was not intended by Page nor Moore to be a condition precedent to this obligation.

Even if, however, it could be said that such a letter were deemed necessary by Page, it is submitted that Graver is estopped upon equitable principles from contending that on that account it is not liable to Mosher. The only thing which remained to be done to fully document the responsibility to Mosher was the signing and sending of the letter prepared for Mr. Trytten's signature on December 12, 1961. (Jt. 21).

On that date, Lancaster knew that Mosher had required that Graver guarantee payment. (Union L). Harle, Branting, Feurt and Root all knew that Mosher expected Union to be responsible for payment (Union L, Jt. 61, Jt. 45, Jt. 50; also see the testimony of Page, Harle, Branting and Feurt recited above), and would not ship unless Graver agreed to be responsible for payment. Harle was so convinced of this fact that he says he based his understanding that the entire account had been guaranteed by Graver on the fact that by February 16th the shipments had been made and the job was complete.

Even Mr. Trytten knew it. (Jt. 24).

In addition, at least Harle, Branting, Feurt and Trytten knew that Jt. 26, the Vernon John letter of November 13, 1961, had been received and authorized Graver to pay and to deduct from the Joint Venture contract price.

There is absolutely no other way to interpret both the language and the fact of Jt. 21, Jt. 24 and Jt. 30 except in terms of the fact that Mosher expected Graver to pay the entire account, that Graver knew this to be a fact, that Graver was in a position to do so with no risk to itself, by deducting the amount of the Mosher invoices from the Joint Venture contract price, and that Page had informed Moore that Graver would make payment directly to Mosher

and would deduct such payments from the Joint Venture contract price and would write Moore a letter to this effect. With this knowledge long antedating, except in the case of Trytten, the December 12th date, and with the knowledge Mosher Steel shipments were not being held up, Trytten, Feurt, et al, if they did not intend to carry through, sign and mail Jt. 21, were certainly under a duty, under all the circumstances, to speak up—to bring this fact to the attention of Mosher.

This they did not do. They did not return the alleged call from the mysterious man at Mosher. They did not do anything at all which would have disabused Mosher of Mosher's understanding as to the payment, but instead, armed with Jt. 26, so that Graver would be protected at any time that it saw fit to sign and send Jt. 21, Graver appears to have taken the cagey, and under the circumstances, immoral and unfair advice of Lancaster and assumed a negative attitude with respect to payment to Mosher, which negative attitude was based entirely on the fact that *Graver* could afford to be *negative* for the simple reason that *Mosher* was *positive*, in that Mosher was continuing to make shipments.

It is to be noted that Mr. Lancaster, in his recommendation as recorded in Jt. 24, makes no objection to guaranteeing, as such, and is quite willing to guarantee on a separate shipment basis whenever Mosher requested it. Thus, Mr. Lancaster's advice, which apparently was followed by Trytten, was a "let sleeping dogs lie" position, which, considering all of the knowledge surrounding the situation, was patently immoral, unfair and fraudulent.

Under the circumstances, it is submitted that Graver is estopped to deny its agreement with the Joint Venture embodied in Jt. 26, and is estopped to deny its liability to Mosher on the ground that the letter was essential to Graver's obligations.

In making its commitment to Mosher and inducing Mosher to perform the services and supply the materials for the Tucson and Vandenberg jobs, Graver received the following considerations:

1) Graver was enabled to avoid delay in the performance of its contracts with the Fluor Corporation and Mattich Bros. & Sundt, which delay, but for Mosher's willingness to perform when the Joint Venture couldn't, might have resulted in costly damages to Graver as well as Fluor and Mattich Bros. & Sundt.

2) Graver preserved its rights under its contract with IMI-Ward Joint Venture that the IMI-Ward Joint Venture would supervise the portion of the work performed by Mosher.

3) By inducing shipment of Graver's steel fabricated by Mosher it obtained the steel free of a possessory mechanic's lien to which Mosher was entitled under the law of Texas.

Appellee has attempted above to set forth a fairly complete resume of the testimony which the trial court heard in an effort to give this Honorable Court, insofar as is possible from the dead record, a feeling for the testimony as it evolved and an understanding of the reasons why the Honorable Trial Judge evalued the conflicting testimony as reflected in the court's Findings of Fact.

In its argument under Point I Union reiterates some, but by no means all or even a substantial part, of Page's testimony and complains that the trial court credited Moore rather than Page even though Moore was still employed by Mosher and Page had been summarily fired in a questionable fashion by Union. It is believed that the full statement of Page's testimony cited above will convince this court, as

it apparently did the trial court, that Mr. Page was, in most important instances, not credible, and that Moore and the other Mosher witnesses not only were telling the truth but knew what they were talking about. Insofar as the witnesses are concerned, the trial court's Findings of Fact were clearly derived from having had "experience with the mainsprings of human conduct." Lundgren v. Freeman, 307 F. 2d 104, (9 C.A.) 1962; Rule 52(a) F.R.C.P.

As pointed out, not only was Page's testimony contradictory of his depositions, but contradictory from minute to minute on the stand. The testimony, of course, is by no means all upon which the court based its Findings. Not only was Mr. Moore confirmed in large part by the testimony of Mr. Morton, Mr. Vernon John and Messrs. Burton and Mitchell, but the record, letters and memoranda, far from confirming Page's position, overwhelmingly confirm and support that of Moore. For example:

1. Joint 50, the letter dated November 15, 1961, Harle of Graver to Burton of Mosher, wherein Harle, after talking with Page, wrote Mr. Burton, "I spoke to John Page and he agreed that the letter should be in Mr. Moore's hands today or tomorrow." The rest of Mr. Harle's letter concerns not only the first shipment, but materials due to be shipped November 20, November 27 and thereafter. It can only be concluded that Page had told Harle that he had, or would forthwith, send a letter confirming Graver's responsibility for the *entire account, not just for one shipment.*

2. Joint 25, the telegram dated December 6, 1961, from Harle of Graver to Wright of the Joint Venture, asking that Vernon John send the letter which Harle had seen in Wright's office on November 14, and requesting that the letter bear the same date as the original (November 13).

3. Joint 61, a letter signed by Tom Harle of Graver and written to Frank Wright, of the Joint Venture, dated November 30, 1961, subject "Mosher Steel Co.", in which he informed Wright, "You may recall that Mr. John *worked out* an arrangement with *Mr. Page of Graver* and *Mosher Steel* for *payment* of the invoices 'when due'."

4. Joint 24, the memorandum from E. F. Feurt of Graver to J. P. Trytten of Graver, dated December 12, 1961, subject "IMI-Ward Guarantee, Mosher Steel Co.", in which the procedure for payment of Mosher is set forth in detail for *payment by Graver direct* upon the receipt of certification from the Joint Venture that the material had been received and the invoice was approved for payment, with the *positive* statement that, "The disbursements will be made on the following schedule:

December 1961	$ 50,000
January 1962	100,000
February 1962	100,000

and stating that he had asked Mr. John to send Mosher's first invoice and that Vernon John had promised to send it to him. This document also contains a memorandum to the effect that Clark Root the *President of Graver (R. 816) had agreed.* (Trytten dep. Pl. Ex. 36, p. 357).

After complaining of the trial court's choice of Moore and the other witnesses and documents over Page, Union states the use of the word "enlarged" instead of "confirmation" in the letter which Trytten prepared for Union on December 12, which was never sent (Jt. Ex. 21), is exceedingly significant because it was prepared for private circulation and consideration by Graver's officers. It may be doubted that, in drafting the letter, Trytten was vitally concerned with whether he was enlarging a guarantee or confirming one, but *the great and overwhelming significance*

of the letter is that on *December 12* an entire group of officers of Union, without one word of demand from Mosher since the conversation between Moore and Page on November 15 and the telegram sent to Moore on that date, were proceeding none the less through the letter and memo of the same date to carefully carry out the commitment which Page had made to Moore on November 15, almost a month earlier, and while the letter which was never sent used the word guarantee it is quite clear from Jt. Ex. 24, the memo of procedures for carrying out the agreement with Mosher, that Union was to pay Mosher *direct* and *deduct* the same from the Joint Venture *contract* in accordance with the Vernon John letter (Jt. Ex. 26). In fact, it is obvious that the preparation of Jt. Ex. 24 was triggered by the receipt of the Vernon John letter and the memo contains the statement that "If Mosher's prices are the same, or less, than those of IMI-Ward, no deduction would be made from our payments to IMI-Ward. We would deduct only the excess cost, if any." While the memo was triggered by the receipt of the Vernon John letter the *obligation to Mosher* resulted from the agreement made by Page with Moore which was obviously known to Union's officers who were carrying out the Page agreement.

Finally, Union complains that the $22,700 of liability for work done on the steel destined for Vandenberg was simply tossed in by the trial judge, and Union's complaint in this regard results solely from a question and answer propounded to Mr. Moore with respect to whether, in a specific telephone conversation, *Moore had told Page* that Mosher had agreed to do the Vandenberg work. Moore forthrightly answered that he had not told Page that in that telephone conversation, and since nobody else in Mosher had talked to Page that nobody in Mosher had told Page that Mosher had agreed to perform the Vandenberg work. This is cer-

tainly slim evidence upon which to base the proposition that the Page-Moore agreement of November 15 referred only to Davis-Monthan and not also to Vandenberg, and yet it has led Union throughout its brief to refer to the Page commitment as a commitment involving "Davis-Monthan."

In the first place, at the time when the telephone conversation between Page and Moore occurred, Mosher had indeed not yet agreed to perform the Vandenberg work because the agreement to perform the Vandenberg work under Jt. Ex. 10 depended upon Union's agreement to pay. Thus it would have been most unusual if Mr. Moore had told Mr. Page that Mosher had agreed to perform the Vandenberg work. Set forth against the inconclusiveness of what Moore *didn't* say on pages 31 and 32 of Union's brief is the fact that the Vernon John letter (Jt. 26) and Jt. 20, to say nothing of the unsent letter itself, Jt. 21, all confirm that the Vandenberg and Davis-Monthan jobs were at all pertinent times considered together. Of course, the testimony by Mr. Moore that he asked for and received a commitment for the entire account, so often stated in the record by Mr. Moore and others, certainly stands for the proposition the parties were discussing the Vandenberg matter along with Davis-Monthan because the assurances required and received were in relation to both purchase orders issued by the Joint Venture (Jt. Exs. 9 and 10). Thus the conversation between Moore and Orr and Morton of the Joint Venture on November 13 dealt with both jobs, and it is obvious that the ensuing conversations between Vernon John and John Page and all of the conversations and letters leading up to the conversation between Page and Moore on November 15 included the Vandenberg work. As we said, this is also supported by the documentary evidence listed above.

Next Union takes the position that even though Moore's testimony is the truth, and the many documents and other testimony supporting it are true, nevertheless the agreement was not a "direct" contract but a guarantee or agreement to pay in the event the Joint Venture failed or refused to pay and that this agreement was not to be deemed operative unless or until "given final approval" in writing. In support of this line of reasoning Union quotes three or four instances during the two depositions of Mr. Moore and during the testimony of Mr. Moore on the stand which consumes pages 350 through 460 of the reporter's transcript in which Mr. Moore used the word "guarantee" in characterizing the requirement *which he made of Union* in connection with the Tucson and Vandenberg jobs. Regardless of the word which Mr. Moore used to characterize his requirements, it is entirely clear that Mr. Moore *expected to be paid direct* by Union. It is also quite clear that regardless of the words used by Mr. Moore to characterize *his requirements of Union*, the fact is that *Union and the Joint Venture agreed*, for various reasons of their own, that IMI-Ward would have to agree, and did agree, that Union would pay Mosher *direct* and *deduct* the payments from the Joint Venture contract price, *and it was exactly this method which Page in turn agreed upon with Mr. Moore.* In this way, the Mosher matter could be handled exactly as had the purchases of Graver supplied material, not as an offset to progress payments presented by the Joint Venture to Union, but as a reduction in the contract price itself. In this way, the parties avoided any problems related to the assignment of any progress payments to the United California Bank. Furthermore, regardless of the sometime characterization and the non-legal use of the word "guarantee" by Mr. Moore, when he was cautioned on the stand that he should tell the court as close as he could remember, the exact words Mr. Page used on the telephone on Novem-

ber 15 (which request was joined in by Union's counsel) his exact statement is as follows:

> "A. I don't know as I can give you word by word that was spoken at all, but I did tell Mr. Page that we were practically ready to make the first shipment on this and we had to have something definite about the payment for the fabricated material. And I asked him if he had gotten approval from Mr. Morton for them to pay us direct and deduct it from the contract. He said that he had talked to Mr. Morton and Mr. Morton had given him approval. And he stated that he would write me a letter in a day or two giving, outlining this agreement by Mr. Morton for the payment of the material." R.T. 362

Finally, again seeking critical words in oft-repeated testimony and exhausting cross-examination of Mr. Moore, in which the specific wording was much more significant to Union's counsel than it was to Mr. Moore, Mr. Moore said, in one statement made, that Page said that he would write Moore a letter in a day or two "giving final approval on this agreement." In discussing the same matter he had also characterized the promised letter as "outlining this agreement."

Union, in its brief, has seized upon the words "final approval", mentioned once in Moore's testimony, as being absolute proof that Moore did not consider that Page's promise to pay direct in accordance with Page's understanding with Morton was an absolute commitment, but that somehow there was some doubt that the "final approval" would come and that therefore this letter was a condition precedent to the contract.

Nothing could be further from the truth. When questioned *specifically* about the letter and its meaning it was quite clear that Moore, as a result of his conversation with Page, did not consider that the forthcoming letter was to be anything other than a written confirmation of Page's oral agree-

ment. See pp. 40-41 above in this brief for a quotation of Moore's testimony in this regard.

The telegram which Page sent to Moore immediately following the November 15 conversation, insofar as it referred to the promised letter, reads as follows: "Complete details will follow in letter early next week." (Jt. Ex. 22). There was certainly nothing in that language which did anything but confirm Moore's understanding that the letter promised by Page would indeed be forthcoming. And neither Moore nor Page considered that the letter which was merely to contain the *complete details* was a condition precedent to the agreement made by Page on the telephone. See page 41 above in this brief for a statement of Moore's testimony relating to the letter mentioned in the telegram.

Of course, there were really no "details" to be worked out in view of the fact that there was no problem relating to the purchase orders or the authorization by the Joint Venture to Union contained in the Vernon John letter. The agreement between Page and Moore related to payment only. Remember that Vernon John testified that the letter of *November 13* (Jt. Ex. 26) was sent pursuant to discussions with *Page*. The $225,000.00 figure mentioned in the Joint Venture letter to Page (Jt. Ex. 26) is stated in that very letter as being only an *approximation*. It was clearly not intended to limit the authority.

In its Argument under Point I, pages 33 through 41 of its brief, Union first cites a number of cases for the proposition that *matters of law* may be reviewed by the Appellate Court, a proposition which need not be belabored; including a statement "When a finding is essentially one dealing with the effect of certain transactions * * * rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings should not be set aside, unless clearly erroneous, but is free to draw its own conclusions."

Next Union cites numerous cases and texts for the authority that where the parties negotiate *with the intention* that they are not to be bound until a formal written document is signed, the signing of the formal written document is a condition precedent to a binding contract. Other cases are cited for the proposition that this is also true with respect to an oral promise to sign a written guaranty as requiring a confirmation in writing in order to satisfy the Statute of Frauds.

Of course, all these cases including the case upon which Union places its greatest emphasis, that of Merritt-Chapman & Scott Corp. v. Gunderson Bros. Eng. Corp., 305 F. 2d 659, C.A. 9 (1962), concern themselves with the legal result where the parties were in the process of bargaining and *had not yet reached an agreement*, or where, of course, the Statute of Frauds requires a written contract.

Thus, Union, in citing these numerous cases, ignores or misses the fundamental point, which is that the Trial Court in this case has found *in resolving disputed facts* as follows:

1. That on November 13, 1961 Vernon John addressed a letter to Page authorizing Graver to pay Mosher's invoices direct and to deduct the amounts from the IMI-Ward subcontract price on the Tucson and/or Vandenberg AFB sites, and that Page had requested John to write him a letter of this nature (Finding of Fact 34, R. 1231).

2. That on November 15, 1961 Page informed Moore that he had obtained clearance for Graver's paying Mosher directly and that Graver would make payment to Mosher directly with deduction being made from the IMI-Ward contract and that Page would write Moore a letter to this effect (Finding of Fact 35, R. 1231).

3. That on November 15, *prior* to the telephone conversation between Moore and Page Harle had sent Page a TWX (Jt. Ex. 45) and had also talked with Page by telephone.

That Page had informed Harle that Page would take care of the problem relative to the credit, and Harle, on the same date, wrote a letter to Burton of Mosher stating that the letter from Page should be in Moore's hands on November 15 or November 16 and issuing specific instructions regarding how the steel fabrication work and its delivery should be accomplished (Jt. Ex. 50; Finding of Fact 36, R. 1231-1232).

4. That *prior* to Page's conversation with Moore on November 15 Page *knew* that Mosher sought a guarantee of the whole account and in the telephone conversation as well as the telegram *Page intended* that Moore understand that the letter was to relate to the entire fabrication job (Finding of Fact 38; R. 1232).

5. That by reason of Moore's telephone conversation with Page on November 15, 1961 and the telegram from Page of that date Moore *understood* and *had reason to understand* that Graver would pay Mosher *directly* for *all* the work described in Jt. Exs. 9 and 10 and that this resulted in Mosher's release and shipment of the steel fabricated pursuant to Jt. Exs. 9 and 10 and that but for this statement by Page on November 15 and his ensuing telegram, Mosher would not have accepted IMI-Ward as its customer and would not have proceeded with the work (Findings of Fact 38 and 39; R. 1232 and 1233).

6. That in agreeing to pay Mosher directly Graver through Page, *acted primarily* to protect and advance *its own interests* under its subcontracts with Fluor and Matich Bros. & Sundt. (Finding of Fact 40, R. 1233).

7. That after Page was terminated, other officials of Graver *knew that Page had informed Moore* that Graver would make payment directly to Mosher and that Mosher was proceeding with the work in reliance upon Page's statement to Moore (Finding of Fact 44; R. 1234 and 1235).

8. That the sending to Mosher of the letter mentioned in Page's telegram of November 15, 1961 *was not intended by Page to be a condition precedent* to Union's agreement or obligation to pay Mosher (Conclusion of Law No. 7, R. 1238 and 1239).

A reading of the testimony outlined above in this brief and of the reporter's transcript will certainly make it clear that the court, in the above Findings of Fact resolved disputed facts, which findings are not only not "clearly erroneous", but are substantiated by the overwhelming preponderance of the evidence. In the Merritt-Chapman & Scott case, supra, emphasized by Union, the court says, at page 664 "This case bristles with indicia of negotiation."

There were certainly no indicia of that sort in this case. In this case, the entire agreement with respect to payment was complete in the conversation between Page and Moore on November 15 and the letter which Page was to send was merely to document the agreement, and the court has so found in its findings as to the intent of the parties.

Union assigns great importance in the Trial Court's findings to the fact that Harle had numerous contacts with Mosher's officers, and cites, for the proposition that these dealings between project managers and others concerning the performance of construction contracts are not sufficient to form the basis for contractual relationships, the case of Fidelity & Deposit Company of Maryland v. Harris, 360 F. 2d 402 (C.A. 9, 1966). It will be recalled that Harle, in addition to being expeditor, was also Director of Purchases. We find nothing in the Court's findings or conclusions to support the proposition that the Court relied heavily upon Harle's contacts as expeditor with Mosher's officers as forming the basis for Union's promise to pay. In the Fidelity & Deposit Company case *the trial court had found that no contractual relationship existed*, and this court, in upholding

that finding, observed that "There is an *obvious distinction* between dealings relating to the performance of his work with a person whose relationship to the prime contractor is too remote for Miller Act coverage, and *conversations or conduct from which an inference of a promise to pay would be warranted.*"

Under heading B (2) of its Argument under Point I, Union takes the position that its obligation was, after all, a promise to answer for the debt or default of the Joint Venture and was therefore required to be in writing under the Statute of Frauds.

In considering this proposition it should be remembered that the trial court, supported by ample and overwhelming evidence determined that: (1) The impetus, and indeed requirement, which caused the Joint Venture to seek additional fabricators for the performance of the missile site jobs came initially from Union. (2) Facts were found upon which a contract could be predicated between Union and Mosher for performance of the work applicable to Tucson prior to the request by the Joint Venture that Mosher accept its purchase orders, a contract based upon the October 13th meeting between Wilson, Mitchell and Burton and the letter agreement dated October 16th; that both Union and Mosher had commenced performance of that contract prior to October 31st, Union having forwarded steel belonging to Union, and so stenciled, to Mosher's plant for fabrication and Mosher having commenced its work thereon. (3) The request made by Holmes and Orr on behalf of the Joint Venture on October 31st was that Mosher accept the Joint Venture's purchase orders *for convenience of accounting and administration of the projects*, to which request Mosher *would not*, and *did not*, accede, *until Union's obligation to pay Mosher direct had been received in the telephone conversation with Page on November 15th*, and that the acceptance of the Joint Venture purchase orders *was conditioned*

upon and *occurred at the same time* as did Union's obligation. (4) The primary purpose of Union in obligating itself to pay Mosher direct was its own interest rather than the interest of the Joint Venture.

Thus, Union's obligation in this case was, *in its own terms direct*, rather than collateral; was created coincidentally with the obligation of the Joint Venture; and was made by Union primarily for its own advantage. This latter, not only because Union was contractor to Fluor and Matich Bros. & Sundt, but, in addition, because it had initially been bound with respect to the Tucson job and its steel in the hands of Mosher was subject to a lien in Mosher's favor for the fabrication work done.

In addition, there are, of course, several written instruments which document the obligation to Mosher, albeit not delivered to Mosher.

Frankly, the *terms* of the Union obligation as explained by Page to Moore and so fully supported by other testimony and numerous letters and memoranda, as pointed out above in this brief, would certainly appear to make a comprehensive research of the law relating to the Statute of Frauds unnecessary, because the contract was clearly by its own terms a direct obligation and not an obligation to answer for the debt or default of the Joint Venture.

Union, however, has seen fit to argue the matter, and it is submitted that the following brief on the subject clearly substantiates the proposition that, even if the obligation *had* been (which it was not) in its terms to answer for the debt or default of the Joint Venture, nevertheless, under the facts outlined above, the Statute of Frauds could not be used to defeat Mosher's claim against Union.

The Restatement of the Law of Contracts states as not being within the Statute:

> "A Promise, the Consideration of Which is Desired for the Promisor's Advantage.

> "Where the consideration for a promise that all or part of a previously existing debt of a third person to the promisee shall be satisfied is in fact or apparently desired by the promisor mainly for his own pecuniary or business advantage, rather than in order to benefit the third person, the promise is not within Class II of Section 178, unless the consideration is merely a premium for the promisor's insurance that the duty shall be discharged." *American Law Institute*, Restatement of the Law of Contracts, Section 184.

One of the illustrations given under Section 184 of the Restatement refers to a situation involving the construction of improvements, as follows:

> "D contracts with S to build a house for S. C. contracts with D to furnish materials for the purpose. D, in violation of his contract with C fails to pay C for some of the materials furnished. C justifiably refuses to furnish further materials. S orally promises C, that if C will continue to furnish D with materials that C had previously agreed to furnish, S will pay the price not only for the materials already furnished but also for the remaining materials if D fails to do so. S's promise is enforceable."

The above quoted section of the Restatement states the law as it applies to the relationships of owners, contractors, and subcontractors in virtually all the States. Even those States which do not specifically ascribe to the "Main Purpose Rule" embodied in Section 184 of the Restatement, nevertheless hold that the promise of the owner or prime contractor, to induce a materialman or laborer to supply materials to, or perform work for, a subcontractor, in furtherance of a construction project is an *original* undertaking based upon a separate and distinct consideration and is, therefore, not within the Statute of Frauds.

Such is the law in the State of *Illinois:*

The earliest Illinois case found is *Clifford v. Luhring* (1873), 69 Ill. 401, in which the Statute of Frauds was held not to apply where:

> "It appears the contract for the whole work on the building was let by defendant to one Gruis, of whom plaintiffs were sub-contractors, and on his failing to perform his contract with them, they testify they made known the fact to defendant, and informed him they would be obliged to quit the work, when he told them to go on, and he would pay."

The plaintiff was a plasterer and the reason given by the court for holding that the obligation was an original undertaking, resulted from the fact that the defendant's object was to promote an interest of his own, as follows:

> "* * * Here, the object and purpose of defendant were to have the plastering speedily finished, that he might rent the building, and thus derive income from it. This was the motive."

Again in *Schoenfeld v. Brown* (1875), 78 Ill. 487, it was held that the owner's oral promise to pay a subcontractor was not within the Statute of Frauds, saying:

> "* * * We should, therefore, give the Statute of Frauds a less rigid application than had appellant had no interest in, or benefit growing out of, the contract. * * *"—At Page 491.

In a more recent case, *Whiting v. Gilchrist* (1950), 339 Ill. App. 511, 90 N.E. 2 288, it was held that the Statute of Frauds did not prohibit an oral agreement by a creditor who took over operation of a mine to pay back wages:

> "* * * knowing that if he could persuade men to continue working, he might be able to reimburse himself for money loaned to the original employer * * *"

In *Wickham v. The Hyde Park Building and Loan Association* (1898), 80 Ill. App. 523, it was held that an oral

promise, supported by a consideration for the benefit of a third person, was not within the Statute of Frauds, and:

> "It is not necessary to the validity of a promise made for the benefit of a third person that the original debtor should be discharged."

In *Wilson v. Bevans* (Sup. Ct. Ill., 1871), 58 Ill. 232, the court held than an oral agreement by the defendant to pay the debts of a third person, made in connection with the defendant's purchase from the third person of certain articles of personal property and an interest in a lease, was valid despite the Statute of Frauds because a valuable consideration was received by the promisor himself and created a contract for the benefit of a third party, saying:

> "The general rule is, if a promise is in the nature of an original undertaking to pay the debt of another, and is founded on a valuable consideration received by the promisor himself, it is not within the statute, and need not be in writing to make it valid and binding,—it will be regarded in the light of a contract for the benefit of a third party, upon which such third party may be found an action for the breach.
>
> "So, where a purchaser of property agreed by parol, in consideration thereof, to pay certain debts of his vendor due to a third person, it was *held*, the promise was in nowise collateral to or dependent on the liability of the vendor, but was an original and independent promise, and not within the Statute of Frauds."

Again, in *Rothermel v. Bell & Zoller Coal Co.* (1898), 79 Ill. App. 667, it was held that an oral promise by an individual to pay a company's debt was valid, notwithstanding the company had not been released by the creditor, for the reason that there was sufficient consideration for the promisor's undertaking and that the creditors could take advantage of his agreement made for their benefit without releasing their claims against the original obligor.

In *Holmes v. Suffrin* (1916), 198 Ill. App. 45, it appeared that the defendant was the owner of a building and had contracted for the remodeling and improving of his building. The contractor had in turn made a subcontract with plaintiffs. The contractor failed to pay the plaintiff subcontractor and the defendant promised:

> "* * * in case the plaintiffs would proceed with and complete the work they had undertaken to pay them the amount due and to become due, and that this was a direct and original promise and not within the Statute of Frauds; * * *"—At Page 46.

It further held that:

> "A valid oral promise may be made with regard to the debt of a third person without releasing the original debtor."

This decision of the court was rendered despite the fact that the plaintiff had charged the account on its books to the prime contractor, holding that this fact was not conclusive as to whether the promise was direct and original or collateral.

Such is the law in the State of *New York:*

The same rule that:

> "Where one working by the day for a subcontractor continues the work on the agreement of the contractor to pay him, this is an original undertaking on a sufficient consideration, which need not be in writing." *Snell v. Rogers* (1893, N.Y. Sup. Ct.), 24 N.Y. Sup. 379.

In Ohio, the Supreme Court of Ohio, in *Crawford v. Edison* (1887), 13 N.E. 80, adopts the theory of *Clifford v. Luhring* (Ill.), supra, in holding that an oral promise by an owner to pay a subcontractor to induce the subcontractor to complete the job after the contractor had abandoned the job, was not within the Statute of Frauds because:

> "When the leading object of the promisor is not to answer for another, but to subserve some pecuniary

> or business purpose of his own, involving a benefit to himself, or a damage to the other contracting party, his promise is not within the statute of frauds, *although it may in form a promise to pay the debt of another*, and its performance may incidentally have the effect of extinguishing that liability."

Such is the law in the State of *Arizona:*

In *Roy & Titcomb v. Flin* (1906, Sup. Ct. Ariz.), 85 Pac. 752, the court held that a surety upon a contractor's bond (Roy & Titcomb) which had been required to complete a construction contract, was liable upon an oral contract with a subcontractor of the defaulting general contractor, to pay a debt due the subcontrator from the general contractor because it was given as an inducement for the resumption of work by the subcontractor at a time when the subcontractor was under no legal obligation to proceed, and was founded upon a consideration beneficial to the promisor, saying:

> "* * * The promise of one person, although in form to answer for the debt of another, if founded upon a new and sufficient consideration, moving from the creditor and promisee to the promisor, and beneficial to the latter, is not within the statute of frauds, and need not be in writing, subscribed by him, and expressing the consideration."—At Page 726.

In a later case, *Steward v. Sirrine* (Sup. Ct. Ariz., 1928), 267 Pac. 598, it was held that an oral contract by the purchaser of land that he would pay the balance due plaintiff from the previous owner on a mortgage, was not within the Statute and announced the rule in Arizona, as follows:

> "* * * The rule has frequently been announced that where the leading object of a party promising to pay a debt which was originally that of another is to protect his own interest and not to become the other's guarantor, and such promise is made upon sufficient consideration, it is valid although not in writing."

Such is the law in *Texas:*

In an early case, *Green v. Dallahan & Co.* (1881), 54 Tex. 281, the Supreme Court found that a contractor came to the plaintiff's lumber yard to order lumber to construct a house for the defendant, that the plaintiff refused to let the contractor have the lumber unless the defendant would agree to pay for it. The defendant at first refused to pay for the lumber, saying that he had made a contract with the general contractor for a fixed sum, but, when the plaintiff remained adamant, the defendant told the plantiff to furnish the lumber to the general contractor and he, the defendant, would pay for it.

Under these facts, the court found that the defendant's agreement was not collateral to that of the general contractor, but was an original one and within the Statute of Frauds, and that the fact that payments made to the plaintiff:

> "* * * were upon the orders of Durland (general contractor) is not inconsistent with this view, as on final settlement between Green and Durland they would be vouchers against the latter."—At Page 286.

In *Lyon v. Lindsay* (1897, Tex. Civ. App.) 39 S.W. 1101, it was held that:

> "Delivery to a contractor of materials necessary to perform the contract inures to the benefit of his sureties for such performance, and therefore a promise of the sureties to be responsible, on which the materials were delivered, is not within the Statute of Frauds."

In *Harp v. Hamilton* (1915, Tex. Civ. App.), 177 S.W. 565, it was held that the oral promise to pay pasturage for cattle, due from another, to induce the creditor to release possession of the cattle and the lien thereon, was an original promise not within the Statute of Frauds, even though not extinguishing the original indebtedness.

That a direct benefit to the promisor will take an oral promise out of the Statute of Frauds, is still the law of Texas. In *Dallas Title & Guaranty Company v. Jarrell* (1959) (Tex. Civ. App.), 320 S.W. 2d 696, it was held that an oral promise by a title company to pay a retailer of fixtures ordered by a house builder was not within the Statute of Frauds, in view of the benefit derived by the title company in supervising payments of outstanding bills on closing, and the protection of the title company from the possibility of future mechanic's liens.

In *Wells-Grinnan M.A.B. v. Belton Sand and Gravel Co.* (1956) (Tex. Civ. App.), 293 S.W. 2d 70, it was held that an oral agreement to pay a subcontractor made by a prime contractor, who had a contractual obligation to furnish the materials, was not within the Statute of Frauds because the prime contractor had pledged his own credit and made himself directly liable.

In *Grammar v. Builder's Brick and Stone Company* (1955) (Tex. Civ. App.), 277 S.W. 2d 185, it was held that landowner's oral agreement to pay materialmen for materials purchased by another was an original, rather than a collateral, undertaking supported by a valid consideration (the failure to file a lien upon the land) and, hence, not within the Statute of Frauds.

Such is the law in the State of *California:*

There also it is the rule than an oral contract to pay past due indebtednes of another is not within the Statute of Frauds, where it is based upon a consideration that was beneficial to the promisor. In *Behannesey v. Paton* (1928) (Sup. Ct. Calif.), 264 Pac. 763, it was held that a company financing a motion picture, after taking over production, was held liable on its oral promise to pay for properties contracted for by the original producer, since the plaintiff was induced thereby to complete the contract.

Again in California, in *Michael Distributing Company v. Tobin* (1964) (D.C. App.), 37 Calif. Reporter 518, the court reiterated that the California Supreme Court had approved the "main purpose" or "leading object" rule. It was held that an individual, who owned 51 per cent of the capital stock of corporations which were building a housing project, could be held liable upon an oral contract to pay suppliers of material, even though the individual had agreed to pay the amount:

> "* * * through the corporations rather than to plaintiff direct * * *"

and that:

> "* * * the pecuniary benefit which the individual hoped to reap from the success of the housing project, was the main object of his promise * * *" — At Page 524.

The courts stated the rule as follows:

> "The purpose of the statute of frauds was to prevent, not effectuate, wrong. Were it not for the statute, verbal contracts of the type in question would be upheld, since they have both promise and consideration. However, there the alleged promisor is an absolute stranger to the transaction, and without interest in it, the obligation of the statute will be strictly upheld.
>
> "* * * But cases sometimes arise in which, though a third party is the original obligor, the primary debtor, the promisor has a *personal, immediate, and pecuniary interest* in the transaction, and is therefore himself a party to be benefited by the performance of the promisee. In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise * * *" (Emphasis added by court.) At Pages 523-524.

The law in Illinois, Arizona, Texas, and California is also the law in virtually all American jurisdictions:

In Massachusetts, with respect to an owner's oral agreement to pay for work done and to be done, see *Greenberg v. Weisman*, (1963) (Sup. Ct. Mass.), 189 N.E. 2d 531.

The Tenth Circuit in 1960, in *Abraham v. Middleton*, 279 Fed. 2d 107, was faced with a situation in which the oral promise was literally to pay the debt of another, but held where the main object of the promisor is:

> "* * * 'to subserve a pecuniary or business purpose of his own * * *'"

it is not within the Statute of Frauds. In that case, the defendants owned mineral interests adjacent to a tract upon which they had made a farm-out agreement, and therefore defendant's oral promise to pay costs of drilling undertaken by others and an agreement which would redound to their financial benefit if a well were drilled, was made primarily for defendants own business benefit and defendants received new and beneficial consideration, namely drilling of the well. The court quotes Mr. Justice Brewer to the effect that the purpose of the Statute of Frauds is:

> "'* * * that a promisor *receiving no benefits* should be bound only by the exact terms of his promise * * *'"

Again, the Supreme Court of Washington in *Frietag Manufacturing Company v. Boeing Airplane Company*, held that:

> "A complaint alleging that plaintiff supplied materials to subcontractor in construction of a supersonic tunnel for airplane company by reason of fact that agents of company and general contractor assured plaintiff that plaintiff would be paid and that it was at their urgent request that plaintiff agreed to fill the purchase orders of subcontractor was not demurrable on ground that such promise was barred by statute of frauds, since allegations were sufficient to support finding that assurances of company and general contractor were given to secure a benefit to themselves, a tech-

nically satisfactory and expeditious construction of the needed parts, and there was no allegation to show that they had any motive or purpose to benefit the subcontractor." 347 Pac. 2d 1074, — At Page 1075.

In Illinois, a case very similar on the facts to the case at hand is *Granite City Lime and Cement Company v. The Board of Education of School District No. 126, et al.*, 203 Ill. App. 134.

In that case one Beale (prime contractor) entered into a contract with the Board of Education of School District No. 126 (owner) for the erection and completion of a high school building. Thereafter, Beale entered into a subcontract with Mettlen to furnish building material and brick work for an expressed consideration. Thereafter, Mettlen placed an order with the plaintiff for the necessary brick and other building material. After Mettlen had placed the order, and before any material had been delivered, plaintiffs learned that Beale and Mettlen had agreed that Beale would pay for the materials furnished and the Chancellor found that Beale agreed, before the material was delivered, to pay for it, and that the material was furnished upon the strength of the promises of Beale. *Despite the fact that plaintiffs delivered the materials to Mettlen and recognized Mettlen as subcontractor and charged the goods to Mettlen upon their books, nevertheless, the promise of Beale was held to be an original undertaking, and Beale was liable upon such promise.*

It is interesting to note that the plaintiffs sued the Board of Education, Beale, and Mettlen. It was also contended by Beale that, the materials having been furnished to a *subcontractor* under the mechanic's liens statute, the plaintiffs had no right to a lien upon the building. The court found that the mechanic's lien was properly available to the plaintiff under the circumstances. The court said:

"* * * It does appear from the evidence in this case that after the contract was made between Beale and

> Mettlen & Company and after Beale had promised that he would pay for the materials furnished, that Mettlen & Company did give orders to appellees (plaintiffs) upon which they received payment, and that when appellees gave their first notice they referred to Mettlen & Company as subcontractors and did other things by which they recognized Mettlen & Company as subcontractors, but if they had a contract with appellant that he was to pay for the materials furnished, the mere fact of their having recognized Mettlen & Company as subcontractors afterwards and that the goods were charged to Mettlen & Company upon the books of appellee would not necessarily deprive them of their rights under the promise of Beale to pay for the materials.
>
> * * * * *
>
> "After a careful consideration of all of the evidence, facts and circumstances in this case, we are of the opinion that the Circuit Court was warranted in finding that under the agreement and conduct of the appellant (Beale) that *there was an implied request upon his part to furnish the building material that was furnished* and used in the construction of the building, and that the appellee and the said McEwing & Thomas Clay Products Company are entitled to their lien under this statute, and the decree of the lower court is affirmed."

In *Lusk v. Throop* (Sup. Ct. Ill.) 59 N.E. 529, the Supreme Court of Illinois held that where a contractor told a grocer to supply certain subcontractors with what supplies they wanted and he would pay for them, such promise was an original promise and not a promise to answer for the debts of another within the statute of frauds, despite the fact that the groceries were charged upon the plaintiff's books to the subcontractor and despite the fact that the plaintiff had taken notes and mortgages from the subcontractor.

Finally, with respect to sections of the Statute of Frauds not relating to the promise for the debt or default of another (although in some States, and apparently Illinois, there is some authority that such an agreement is also made valid, see *Spalding v. White*, 184 Ill. App. 218), complete performance by one party to an oral contract will take the contract out of the Statute of Frauds. This is based, of course, upon the ground that to do otherwise would constitute a fraud upon the performing party.

That complete performance by one party will effectively avoid the Statute of Frauds in Arizona is entirely clear. In *Wilson v. Metheny* (Sup. Ct. Ariz. 1951) 236 Pac. 2d 34, the court so held with respect to an option contract to purchase land, stating:

> "It is the law in this State that either part or full performance of an oral contract takes it out of the Statute of Frauds."

This is the law of Illinois, *Fleming v. Dillon*, 18 N.E. 2d 910, the court saying:

> "An oral contract, even for the future conveyance or devise of land, is not within the statute of frauds if it has been completely performed by one of the parties thereto."

This is the law of California, *Marr v. Postal Union Life Insurance Company*, 105 Pac. 2d 649, by which an oral agreement of agency, otherwise within the Statute, is taken out of the Statute of Frauds by virtue of full performance of one seeking to enforce the contract.

This is the law of Texas, *Pettus Oil and Refining Company v. Taber* (Civ. App. Tex.) 153 S.W. 2d 700, by which an oral contract for the sale of an oil and gas lease, otherwise within the Statute, was rendered not affected by it by virtue of performance by one party.

It is axiomatic that a promise to pay the debt of another out of the debtor's property or funds in the hands of the promisor, is an original undertaking not within the Statute of Frauds. See *Holmes v. Hughes* (Sup. Ct. Ariz.) (1924) 226 Pac. 424, in which the proposition is stated as follows:

> "It is a case where the promise to pay the debt of another is in consideration of property or funds received from the debtor for the express purpose of paying the debt. This promise is not within the statute of frauds, as the promisor thereby makes the debt his own and incurs a primary liability to which, as the authorities say, the continuing obligation of the debtor is in a sense collateral."

The exhibits in this case, supported by the testimony tends to prove that there is a contract which is binding upon Union.

A contract binding under the statute of frauds may be gathered from the letters, writings, and telegrams of the parties in the event they express the essentials of a contract. *Hebets v. Scott,* 152 F. 2d 739 (9 CA Ariz.)

No particular form of language or instrument is necessary to constitute a sufficient note or memorandum under the statute and it is immaterial whether the writing was made for the purpose of furnishing evidence of the contract or for some other purpose. 37 CJS Frauds, Statute of Sec. 175, Page 653.

The evil the statute seeks to guard against is the use of oral evidence to prove the contract. This is obviated by the production of the memorandum the execution and contents of which satisfy the statute, albeit it was never delivered. 49 Am Jur Statute of Frauds Sec. 390, Page 692, Anno. 12 A.L.R. 2d, 508, 511

A letter or telegram sufficient as to contents and signature to constitute a memorandum satisfying the statute of

frauds, or a part of such memorandum if more than one writing is involved is held adequate for this purpose even though it is not intended for, or addressed, delivered or known to the other contracting party. 37 CJS supra. Sec. 173, Page 651

Mosher Steel Company had a mechanic's lien under the Constitution of Texas upon the steel belonging to Union for the value of Mosher's labor thereon.

This lien is created by Article 16, Section 37 of the Constitution of Texas, which reads as follows:

> "Mechanics, artisans and material men, of every class, shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefor; and the Legislature shall provide by law for the speedy and efficient enforcement of said liens."

This constitutional provision establishes a lien upon chattels as well as realty, and is self-executing, existing independently and apart from any Legislative Act. *Strang v. Pray*, 89 Tex. 525, 35 S.W. 1054.

In connection with the law of Illinois, Union cites certain cases on the subject of the applicability of the Statute of Frauds. One of these is *Heggie v. Smith* (2d Dist. 1899), 87 Ill. App. 141. It would appear that this case does not represent the law of Illinois because two years later the Supreme Court of Illinois, in *Lusk v. Throop*, (S. Ct. 1901) 59 N.E. 529, which is also cited by Union, held that where the plaintiff *relied on the credit* of a *contractor* in furnishing groceries to a *subcontractor*, the contractor was liable, *notwithstanding the fact that the supplies were charged on the grocer's books against the subcontractor* and he had taken security from the subcontractor, and it was a question for the jury to determine whether the plaintiff intended, by taking the notes and mortgages from the subcontractor, thereby to release the contractor.

In *Jenkins v. Lundgren*, 85 Ill. App. 494, the jury had found that the plaintiff *did not rely* on the credit of the defendant. *Bonner v. Hansel* also held that it is a question of fact as to whom credit was extended and that all of the circumstances, including the language used, may be considered as a question of fact.

Additional Illinois cases are as follows:

Peters v. Raven, 159 Ill. App. 122. This is a very informative case. The facts were that the *plaintiff* entered into a contract to *deliver merchandise to one Grage.* Thereafter Grage told the plaintiff to *seek payment* from the defendant *Raven*, and Raven told Peters (the plaintiff) that he would *pay* all bills *for goods delivered to Grage.* Peters continued to deliver goods to Grage and *charged the same to Grage.*

It appeared that Raven held a mortgage upon Grage's property. The trial court instructed the jury that it could find for the plaintiff only if the plaintiff "furnished and supplied goods, wares, merchandise and labor to said Grage, intending to hold Raven *alone* responsible * * *" and that if "* * * plaintiff did not rely *alone* upon the promise of Raven * * *" it must find for the defendant.

The case was *reversed* and *remanded* on the ground that the *instruction* to the jury was *erroneous.* The court stated the law of Illinois as follows:

> "In our opinion the instruction is clearly erroneous as applied to the facts shown by the evidence. If, by reason of holding a mortgage upon Grage's property of $4,000 or otherwise, Raven *was interested in the business and primarily to protect his own interest* promised to pay for any goods sold, delivered to, or repairs made for, Grage thereafter, *it was an original* undertaking and not merely a collateral promise to pay the debt of Grage, and *it would not be necessary* to its validity that Peters in selling the goods and making the repairs should have intended to hold Raven

alone responsible for such goods and labor. *A PROMISE SO MADE BY RAVEN WOULD BE NONE THE LESS AN ORIGINAL UNDERTAKING BECAUSE GRAGE ALSO BECAME INDEBTED.*"

Further, the Supreme Court of Illinois, in *Borchsenius v. Canutson* (Ill. S. Ct.) 100 Ill., at page 92, cited with approval the doctrine of *Clifford v. Luhring*, stating:

> "* * * where the leading object of the undertaking is to promote some interest of the party's own, his promise to pay is not within the Statute of Frauds * * *",

and that:

> "* * * Where the plaintiff, in consideration of the promise, has relinquished some lien, benefit or advantage for securing or recovering his debt, and where, by means of such relinquishment, the same interest or advantage has inured to the benefit of the defendant, — in such cases, although the result is that the payment of the debt of the third person is effected, it is so incidentally and indirectly, and the substance of the contract is the purchase by the defendant of the plaintiff of the lien, right or benefit in question * * *"

The Court went on to hold that an *oral promise to pay the debt of another* given to *induce* the *plaintiff to part with an insurance policy* which had been pledged to secure the debt of another, and in which the promisor was *financially interested*, inured to the benefit of the promisor stating:

> "We are of the opinion that the promise here comes within the principle of the above decisions, and that *although in form a promise to pay the debt of another*, it is to be regarded as an *original contract*, and is not within the Statute of Frauds."

Again, in *Connelly Co. v. McCabe*, 175 Ill. App. 607, the Court held:

> "The promise of one person *to pay the debt of another*, supported by a valuable consideration moving to the person making the promise, is an *original* undertaking and not within the statute of frauds."

Furthermore, in the State of Illinois, as elsewhere, where *the promise to pay the debt of another* is made prior to the *existence of the debt itself*, the promise is *an original undertaking*. In *Raveret-Weber Printing Co. v. Wright*, (Ill. App.) 23 N.E. 2d 203, the Court quoted *Resseter v. Waterman* (S. Ct. Ill.) 37 N.E. 875, as follows:

> "* * * But where the defendant promises the plaintiff to pay for goods which the plaintiff may *thereafter* deliver *to a third person*, and which, *at the time of the promise, have not been delivered, no debt* exists from such third person to the plaintiff; and hence the promise of the defendant to pay is an *original undertaking*, and not merely a promise to pay the debt of another.
>
> "According to the complaint, plaintiff did not deliver the goods and merchandise until the defendant had agreed to be responsible therefor * * *"

In its final section under Point I Union argues that as a matter of law, contrary to the Trial Court's Conclusion of Law No. 7, Union is not estopped to raise the non-sending of the letter mentioned in Page's telegram of November 15, 1961 as a defense in view of the facts set out in Finding of Fact No. 44.

The Trial Court has found that the sending of the letter was *not intended by Page to be a condition precedent* to Union's agreement and obligation to pay Mosher, and we think this finding is completely substantiated by the testimony and evidence set out above.

The court has found that on November 15, 1961 Page orally agreed on Union's behalf to pay Mosher directly with deduction being made from the IMI-Ward contract and that he, Page, told Moore that he would write Moore a letter to this effect. The court has further found that the letter which Page promised Moore was to relate to the entire fabrication job, not just the first shipment, and that the telegram of

November 15 from Page to Moore confirmed this. In so stating, the court has found that Page intended Moore to understand it would be one concerning the entire account.

In addition, the court has entered Finding of Fact No. 44 finding that, after Page's termination, other officials of Union knew of the existence of IMI-Ward's letter to Page, knew that Page had informed Moore that Graver would make payments directly to Mosher, and knew that Page had informed Moore that he would write Moore a letter to this effect. They knew also that Mosher was going ahead on the work in reliance upon its understanding from Page's assurance on the telephone and his telegram that Graver would pay Mosher directly for all the work described in Jt. Exs. 9 and 10. The court further found that these officials drafted a letter such as Page had promised but did not execute or send the same because Lancaster, Graver's Vice President, pointed out that Mosher was proceeding with the steel shipments and suggested that the matter be deferred until it was requested by Mosher.

In its argument Union takes issue with the Trial Court's findings, but as pointed out above, they are supported by overwhelming evidence. Secondly, ignoring the findings that the agreement between Union and Mosher was direct and ignoring the law cited above which would render the Statute of Frauds inoperable even if the undertaking had been collateral, which it was not, Union cites a series of Illinois cases wherein the courts have at times at least, prevented the application of equitable estoppel "* * * where an individual is charged with having failed to comply with an *oral agreement rendered unenforceable by statute* or to honor his verbal promise to reduce *such* an agreement to writing."

In this connection, Union cites *Lowenberg v. Booth*, quoting therefrom a statement of the six elements necessary to the doctrine of equitable estoppel. While the statement

of the elements may be correct, the pertinence of the case to Union's argument is questionable, in view of the fact that in the *Lowenberg* case, the court found that there had been no "act, representation or promise, held out to Appellants—", at P. 195, and therefore, no equitable estoppel. More importantly, the *Lowenberg* case goes on to establish in Illinois the rule that "where one seeks to invoke the statute, after having by acts, representation or promises, induced another party to do or forbear the doing of any act, so that such acts or representations constitute a fraud on the other party, the statutes of frauds may not in such case be utilized as a defense—", at P. 195. Thus the case actually holds that the statute of frauds may not be availed of where acts, representations, or promises have misled the other party. Again, in *Ozier v. Haines*, cited by Union, the court found that there was *no misrepresentation or concealment*, and that while this was *not ordinarily necessary* to implementation of equitable estoppel, under the peculair circumstances where the statute of frauds would render the agreement invalid, it was necessary that estoppel *must* be based upon representation or concealment. The court reiterated the law of Illinois that, under circumstances involving misrepresentation or concealment, the statute of frauds would *not* be allowed to create inequity, and could not be raised by way of defense, citing numerous cases in Illinois.

Finally in *Sinclair v. Sullivan Chevrolet Company*, cited by Union, the Supreme Court of Illinois, 202 NE 2d 516, the court again reiterates that equitable estoppel, if based upon misrepresentation or concealment, will indeed render the statute of frauds unavailable to the Defendant, but held that in the *Sinclair* case, "there appears to have been no concealment or misrepresentation of fact", at P. 519.

Thus the Illinois cases cited by Union *support* rather than refute the proposition that, if the undertaking by

Union had been collateral rather than direct, nevertheless the calculating concealment of Page, if it was Page's intention that he would not send the promised letter, together with the action of Union's other officers under the circumstances, would, under the Illinois law estop Union from claiming the applicability of the statutes of frauds in view of Mosher's subsequent reliance. For a statement of Page's testimony wherein he *claims a* calculated concealment, see P. 29 above in this brief.

The case at hand, of course, is not a Statute of Frauds case at all, and *the letter was not essential as a matter of law.* The letter was merely promised by Page both in his telephone conversation with Moore and in his telegram of the same date, which letter, the court has found, was merely to have reduced to writing the obligation which had been expressed orally. The letter itself was not demanded by Moore. (See p. 41 above). Neither Moore nor Page were bargaining on the telephone for the issuance of a letter. Thus, the contract expressed orally was complete even if Page had not told Moore that he would send Moore a letter. The question is whether, even if Page had intended that Union was not to be bound until he had sent the letter, which the court has found he did not, the conduct of Union under the circumstances estopped Union to contend that it was not to be bound until the letter was sent.

The six elements of actual fraud required by the *Lowenberg* case cited by Union may easily be met in this case as follows: (1) the words of Page on the telephone agreeing to pay Mosher direct and to deduct the sums from the Joint Venture contract price pursuant to Morton's approval which had already been given, knowing, as the court has found, that Moore considered the commitment to be firm, and the simple statement that he, Page, would write Moore a letter to this effect, which words and conduct were carried forward in the wording of the telegram to the effect that

"Complete details will follow in letter early next week." constituted, if, at the time they were uttered by Page, Page intended that Union's obligation would *not* be made until he had written the letter, a concealment by Page of material facts; (2) if Page so intended, it is clear he knew the statements were untrue; (3) it is clear, and has been found by the court that Page's intention in this matter, if he had such intention, was unknown to Mosher both on November 15th and thereafter, and that Moore understood, and had reason to understand the contrary; (4) Page and the other Union officers, knowing of Page's agreement, clearly knew that Mosher would and did act in reliance upon Page's agreement; (5) such agreement was in fact acted upon by Mosher, as the court has found, and (6) Mosher acted thereon because of such agreement and would be prejudiced if Union were permitted to claim that the sending of the letter was a condition precedent to its obligation.

Without repeating the court's Findings of Fact No. 44, it is submitted that the Trial Court was amply supported in the proposition that the conduct of Feurt, Trytten, Root, Lancaster, et al, after December 12th, considering their knowledge of the situation, constituted conduct with respect to the sending of the letter which clearly estops Union from claiming that the sending of the letter was a condition precedent to Union's obligation. Under the circumstances these officers of Union were *under a duty to speak up* if they considered that Union was not bound until a letter was sent. This they *did not do* even though they knew that Mosher was continuing performance in reliance upon Page's agreement and in fact, as shown by the Lancaster comment on Jt. 24, *the very reason* why the letter was not sent *was the fact* that Mosher was *continuing to perform.* There can be no doubt that this was fraudulent conduct under the circumstances.

Silence, when there is a duty to speak, is a well recognized basis for invoking the rule of estoppel. The elements of an "estoppel in pais" are well settled; they are essentially: conduct by which one intentionally or through culpable negligence induces another to believe and have confidence in certain material facts, which inducement results in acts in reliance thereon, justifiably taken, which causes injury to the party thus relying. *Builders Supply Corporation v. Marshall*, 352 P. 2d 982 (Ariz.).

This doctrine of estoppel in pais is founded upon principles of morality and fair dealing and is intended to subserve the ends of justice. Estoppel arises from the conduct of a party, using the word "conduct" in its broadest meaning, as *including his spoken words, his positive acts* and *his silence* where there is a duty to speak, and proceeds on the consideration that the author of a misfortune shall not escape the consequences and cast the burden on another. 19 Am. Jur. Estoppel, Sec. 42, p. 641

> "'(Estoppel in pais) holds a person to a representation made or a position assumed where otherwise inequitable consequences would result to another who, having the right to do so, under all the circumstances of the case, has in good faith relied thereon and been misled to his injury.'"
>
> "'A right of action on a contract and for fraud in inducing plaintiff to enter into such contract may exist at the same time, and a recovery on one of the causes will not bar a subsequent action on the other.'" * * * "The courts of many states have recognized the rule that a suit on a contract and a suit for fraud in inducing the contract are two different causes of action with separate and consistent remedies."

See *Bankers Trust Co. v. Pacific Employers Insurance Co.*, 282 F. 2d 106 (C.A. 9th Nev.) citing 19 Am. Jur. 642, Estoppel, Sec 42

Finally, under this section, Union claims that it has already paid the Joint Venture for the work for which it is now sued by Mosher. Appellee reiterates that there is nothing in the record upon which such a statement can be made, nor is it material in this case. In its final paragraphs concerning this section Union ignores the testimony of Burton and Mitchell and then makes a most remarkable statement that "Union would have been in a perfect position to protect itself by deductions from the joint venture contract had Mosher's conduct at the time of these transactions only been consistent with its claims and contentions at the trial." The only response which Appellee can make to this complaint is that unquestionably Union *was indeed in a perfect position* to protect itself and remained in this position throughout, since the authorization contained in the Vernon John letter (Jt. 26) was never rescinded. The reason that Union did not, if it in fact did not, deduct Mosher's work from the Joint Venture contracts is simply that it refused to honor its obligation to pay Mosher.

RESPONSE TO POINT II

Summary of Argument

The agreement between Union and IMI-Ward that Union would pay Mosher direct after IMI-Ward had approved Mosher's invoices, and that the sums paid Mosher by Union would be deducted from the Union IMI-Ward subcontract, did not contemplate that Union's payments would be deducted from progress estimates billed to Union by IMI-Ward, but rather that they would be deducted from the subcontract itself. The agreement between Union and IMI-Ward, having been made known to Mosher, and Mosher having performed in reliance thereon, could not thereafter be changed to Mosher's detriment.

In Point II Union asserts that the court erred in holding that an agreement existed between Union and IMI-Ward that Union might pay Mosher for its work after acceptance

of the work by IMI-Ward, and deduct Mosher's invoices from the contract price between Union and IMI-Ward (R. 1239).

Union simply says that this conclusion by the court is completely at odds with the conduct of the parties.

At this point in the brief we feel it is unnecessary to recite the Vernon John letter, the fact that it was asked for by Union, the fact that such agreement resulted from Mosher's requirements, the fact that George Morton, the Manager of the Joint Venture, completely understood the agreement as embodied in the Vernon John letter, and the fact that Union's officers understood it that way too, wrote memoranda concerning the same and, in fact, so far as the record reveals, never rescinded the agreement except in refusing to pay Mosher. Of course, they could not rescind the agreement, after Mosher had relied upon it to its detriment.

> "A contract for the benefit of a third person which has been accepted or acted on by him, cannot be rescinded by the parties without his consent."

The above quoted rule is a general rule in American jurisdictions, including Illinois; See *Pliley v. Phifer*, 117 N.E. 2d 678, and Texas. See *Mercantile National Bank at Dallas v. McCullough Tool Co.*, 250 S.W. 2 870 (Tex. Civ. App.), and *Pacific American Gasoline Company of Texas v. Miller*, 76 S.W. 2 833 (Tex. Civ. App., error refused). In *Pliley v. Phifer*, (supra) as against the contention that a new agreement had been substituted for the agreement under which the third party beneficiary sued, the Illinois Supreme Court held that the beneficiary is, nevertheless, entitled to suit upon the original contract, stating:

> "Plaintiff's contention overlooks the legal relationship held in Illinois to exist between the third-party beneficiary of a contract and his promisor. * * * The

courts in this State have consistently held that the third-party beneficiary obtains *a vested right* as against the promisor, and this right, once given, *deprives* the promisor of any interest or right in the subject matter of the promise, *including the right to alter, rescind or revoke it;* nothing remains except that the promisor carry out his promise to the third-party beneficiary." at pages 681-682.

The only reasons given by Union for the statement that the existence of such an agreement was completely at odds with the conduct of the parties is said to be the fact that the Joint Venture drew invoices against Mosher's work and assigned such invoices to the California National Bank as security. Here again, there is nothing in the record to substantiate either the fact that the Joint Venture drew invoices against Mosher's work or that the Joint Venture assigned such invoices to the California National Bank.

Union presented two witnesses, Messrs. Middleton and Dean, presumably to show that it had already paid the Joint Venture for the work that Mosher did. The court permitted the testimony to be introduced subject to a later determination by the court whether it was relevant or not. It was, of course, irrelevant insofar as Mosher is concerned under the agreement embodied in the Vernon John letter of November 13 and the terms of the agreement made by Page with Moore on November 15.

There is nothing whatever in the record to indicate that the agreement to pay Mosher direct was contingent upon there being any debt from Union to the Joint Venture. In fact, the method chosen by the Joint Venture and Union involved *a reduction of the Joint Venture contract price,* just as did the cost of Graver supplied materials. Thus if Union did in fact pay the Joint Venture for the work performed for Mosher, it did so *without any approval of Mosher, in clear violation of the agreement between the Joint Venture and Union for the payment of Mosher di-*

rect and indeed *in clear violation of the basic construction contract between Union and the Joint Venture*, which provided, on pages 4 and 5 thereof (JT 8) that no labor would be invoiced unless it had been "in fact paid."

George Morton, the Manager of the Joint Venture, well understood the terms of the agreement evidenced by the Vernon John letter and its effect upon invoices from the Joint Venture to Union and invoices assigned to the United California Bank as follows:

> "Q. If you had assigned the moneys which were due from Graver to the bank, you could not ask Graver to pay them to somebody else, could you?"
>
> "A. No, because I don't quite understand what you're asking. If you're saying once an assignment is made to the bank, we would ask Graver not to — or to pay the moneys out, I would say no; that would be improper. However, if you are referring to the letter written by Mr. John to pay Mosher directly, I think would be done under a reduction in our contract."
>
> "In other words, any moneys paid by Graver would be paid, and the contract reduced accordingly." (Pl. Ex. 40, Morton Dep. 2, pp. 48 and 49).
>
> "Q. Yes. All right, let me ask you this: if your contract with the bank provided that you had assigned all the moneys there were due under this Graver subcontract, you could not direct Graver to withhold moneys from the bank, could you?"
>
> "THE WITNESS: Let me set Mr. McConnell straight. The contract could be modified under the terms of the contract by change orders and any other modifications. This was part of the contract."
>
> "The contract is assigned to the bank, if you want the moneys to be — that result to be sent to the bank, would be in relation to the *modified* contracts."
>
> "What we had authorized by this letter of Mr. John's, where we had authorized Graver to pay two hundred thousand plus figures to Mosher would have resulted

in a modification of the contract and was not an assignment of moneys, and therefore would not fall under the clause that all moneys under the contract had to go to the bank." (Pl. Ex. 40, Morton Dep. No. 2, pp. 51-52).

As we have said, there is no evidence or testimony showing that all or any part of the work done by Mosher was ever paid for by Union to the Joint Venture. There is in the record a January 9, 1962 invoice which is described as being the last invoice relating to structural steel received by Union prior to the Idaho-Maryland Bankruptcy. This related to *Item 4-E* of the Subcontract Silo Structural Steel. The closest Union could get to identifying this invoice with the Mosher work was that *Item 4-E* was the item of which Mosher Steel was supplying only *a part* as follows: "Q. That was the *item* which Mosher Steel was supplying part of? A. Part of, yes." (R.T. 594).

It does not appear anywhere in the record that the invoice of January 9 included the work done by Mosher or any part thereof, since others than Mosher were also performing work under Item 4-E. Another document was introduced which showed a lot of checks, no one or more of which could be identified as having been checks in payment of Mosher's work, or of the January 9 invoice.

In fact, in December of 1961 Frank Wright, Purchaser for IMI-Ward, advised Moore of Mosher that Mosher's invoices theretofore issued to IMI-Ward were not billed by sites and levels. Mosher then rebilled and sent new invoices to IMI-Ward, completing this task on January 19, 1962 (Finding of Fact No. 46, R. 1235). Thus on January 9 the Joint Venture had not yet accepted Mosher's invoices.

The only positive statement which was adduced from all these exhibits was to the effect that *on the date of the bankruptcy*, Union had "overpaid" the Joint Venture. Even

this was true only on *that particular date, and no other*, and it *does not appear* from any document or from any testimony that in the *final analysis*, after all the *change orders* and *impact and accelleration* attributable to the *Joint Venture* has been collected by Union, that Union will not owe money to the Joint Venture.

Here, as in many other parts of its brief, Union takes Mosher to task for *billing the* Joint Venture for its work rather than billing Union. Of course the whole purpose as explained to Mosher of the issuance of the Joint Venture purchase orders (Jt. 9 and 10) from the very inception on October 31, was for *convenience in billing* and the accounting and management of the Joint Venture work. (Another reason to wit, the profit in the work, has been discussed earlier in this brief). In answering the question specifically Mr. Moore made the following statement:

> "Q. How is Graver to perform Page's promise if you don't send them invoices?"
>
> "A. The whole purpose of transferring was for the convenience of billing. It never would have been transferred in the first place if it hadn't been billed direct to IMI for their convenience. That was the way it was presented to us." (R.T. 422)

In addition, the very procedures set up both by the Vernon John letter (Jt. 26) and the Feurt memorandum to Trytten (Jt. 24) *provided that the billing would go to the Joint Venture*, be approved, and *then forwarded* to Union for payment.

Finally, under Point II, Union cites in connection with contracts for the benefit of third parties the general proposition that, in the absence of reliance to its detriment, the rights of a third party beneficiary are subject to the equities between the parties. This, of course, does not apply where the beneficiary *has acted to his detriment* and, particularly

here, *where the beneficiary itself supplied the consideration for the contract.* The two cases cited by Union have no bearing upon this case because in the *Revell* case the agreement to pay the beneficiary *was contingent upon the agreement of Lidke to perform certain work.* The court found that Lidke "*did not do any part* of the work which he agreed to do." Thus Morgan's promise in its terms was conditional upon Lidke's performance, which did not occur.

Likewise in the *Gallopin* case it was held that where one Ernst who had rented a Hertz car under false pretenses and *in the name of another man* had injured the plaintiff, Hertz's insurance carrier was not liable to the plaintiff because *Ernst* was *not* a "*customer*" of Hertz within the terms of the insurance contract between Hertz and the insurance carrier.

There is nothing whatever in the terms of the agreement between the Joint Venture and Union as set forth by the court in its Findings of Fact and as further expressed in Conclusion of Law No. 8, either from the agreement as expressed in the Vernon John letter and the Feurt memorandum, as understood by George Morton and the other parties thereto, or as expressed to Mr. Moore by Mr. Page, which under any circumstances could be interpreted as predicating Mosher's rights to collect from Union on the existence of an indebtedness from Union to IMI-Ward. Indeed, there is not one shred of evidence to support Union's contention in this regard.

RESPONSE TO POINT III

Summary of Argument

Mosher's Proof of Claim, its Stipulation with IMI, the Bankruptcy Court's Findings and its Judgment, all clearly stated and reserved Mosher's claims against Ward, as *joint venturer* with IMI, and against Union, Fluor, and the sure-

ties. Mosher's position has not changed, and no discharge of Ward, Union, Fluor, or the sureties has occurred, either in fact or in law.

In Point III Union claims that Mosher is estopped from recovery by reason of having sought and received a distribution in the IMI Chapter XI proceedings. Union says this is so because Mosher claimed in the Chapter XI proceedings that the work performed pursuant to the purchase orders (Jt. Exs. 9 and 10) was an individual and independent liability of IMI, and, having received stock of the Debtor, in distribution in the Chapter XI proceedings, *cannot now change* its position and claim that the debt was also the obligation of Ward and Union.

Union takes this position *despite the fact* that the stipulated value of the distribution received by Mosher in the Chapter XI proceedings has been deducted from the judgment against Union entered by the court in this proceeding, and despite the fact that both Union and Ward also received valuable considerations in the Chapter XI proceedings.

To support its theory, Union cites the *Eads Hide and Wool Company* case. Union then says that Mosher, having been estopped as against Ward, by reason of the Chapter XI proceedings, Union as surety, is not liable to Mosher. The alleged facts stated by Union in this regard are so completely false and the *position of Mosher* in the IMI *Chapter XI* proceedings so *completely consistent with its position in this suit,* that Union's argument should be summarily dismissed.

Mosher's Proof of Claim in the Chapter XI proceedings (Union Ex. E) reads as follows: Paragraph 2. "That the above named Debtor was at and before the filing by him of

the petition herein, and still is, justly and truly indebted to the claimant corporation in the sum of Three Hundred Twenty-one Thousand Fifty-three and 54/100 Dollars $321,053.54), *except as qualified in Paragraph 10.*"

Paragraph 9 reads as follows: "This claim is filed as an unsecured claim, *except as qualified in Paragraph 10.*"

Paragraph 10, to which attention has been brought in both Paragraphs 2 and 9, reads as follows:

> "Of the total debt hereinabove claimed by claimant corporation against the Debtor, the sum of Fifty-five Thousand Two Hundred Fifty-Three and 21/100 Dollars ($55,253.21) is due and owing to the claimant corporation on account of materials fabricated and delivered to the job site at the Davis-Monthan Air Force Base, Arizona, after the filing by the Debtor of Debtor's petition herein and properly represented expenses of administration of this estate and should be accorded the priority provided by the Act.
>
> "Claimant corporation claims that Ward Industries Corporation, *as joint venturer with the Debtor,* and Union Tank Car Company through its Division, Graver Tank & Mfg. Co., *are also liable* to claimant corporation *for the entire said debt,* but neither Ward Industries Corporation or Union Tank Car Company have admitted such liability, but on the other hand each has disputed the same and refused to pay the same. Claimant corporation's filing of the within claim in this proceeding is made *without prejudice to its rights against the said Ward Industries Corporation, and the said Union Tank Car Company* through its Division, Graver Tank & Mfg. Co., and claimant corporation retains and reiterates said claim against said companies.
>
> "*In addition,* under the Miller Act, Title 40, Section 270a, et seq., of the U. S. Code, claimant corporation has claimed that *The Fluor Corporation, Ltd. and its sureties are liable* to claimant corporation for *that part of the debt relating to the Davis-Monthan Air Force*

Base job, but such claim has been refused and denied by the said The Fluor Corporation, Ltd. and its sureties, but claimant corporation claims its said claim under the said Miller Act and reiterates the same and *files its claim herein without prejudice to its claim against The Fluor Corporation, Ltd. and its sureties under said statute.*"

Appellee does not believe that a more straightforward and comprehensive statement of Mosher's position could have been made, nor a more complete reservation of rights against Ward Industries Corporation, as joint venturer with the debtor, and Union Tank Car Company, The Fluor Corporation and sureties.

Thus Mosher *did not* in its Proof of Claim *elect* to pursue its claim *only* against IMI in the Chapter XI proceedings. Furthermore, if additional proof of Mosher's position be necessary, prior to the hearing and final award of certain shares of stock to Mosher in the IMI proceeding, the debtor and Mosher stipulated their respective positions, *specifically mentioning the cause number of the civil action in the United States District Court for the District of Arizona*, as follows:

"2. Mosher is entitled to an allowance of a general unsecured claim herein in the amount of $265,800.33, subject to the conditions hereinafter set forth in this paragraph. The basis for said claim is as set forth in Mosher's Proof of Claim herein, which said claim is submitted herein *without prejudice to Mosher's rights against others whom it claims are also liable to it.* The parties hereto are in dispute respecting the manner in which I.M.I. stock should be distributed to Mosher pursuant to the Plan herein for Mosher's general unsecured claim. Mosher submits that the stock should be distributed to it direct; I.M.I. submits that the stock should be deposited in an escrow pending the final determination of the action instituted by Mosher against others in the District Court of the United States in the District of Arizona, which action is more fully described in Paragraph 7 hereof. The parties here-

to request that this Court determine the manner in which the I.M.I. stock is to be distributed to Mosher."

"7. Mosher takes and has taken the position that *Union Tank Car Company* and *Ward Industries Corporation*, along with *I.M.I.* and the *Fluor Corporation on its Miller Act bond*, are liable to Mosher for said $55,253.21 *as well as other amounts.* Mosher has filed an action against Union Tank Car Company, Ward Industries Corporation, the Fluor Corporation, and certain insurance companies to attempt to establish the liability of said defendants to Mosher for said amount, *as well as other amounts.* Said defendants contest the assertions of Mosher and said litigation is now pending before the District Court of the United States for the District of Arizona, *being Civil Action No. 1605.*" (Union Ex. QQQ; Pl. 26).

Finally, after a hearing with due notice, the Referee in Bankruptcy, in determining whether Mosher should be entitled to receive stock of the reorganized debtor immediately, or whether said stock, as the debtor contended, should be held in escrow pending final determination in the District Court in Arizona, expressed the following opinion:

"With regard to the second issue, the Court is of the opinion that there is no appropriate reason to delay the delivery of the shares to be issued to Mosher Steel Company pursuant to the Plan of Agreement. As its counsel has pointed out, the value of the stock which Mosher Steel Company will receive as a result of this proceeding will doubtless have to be deducted from the amount of its claim against Union Tank Car Company and the other parties in the Arizona litigation. This claimant is entitled to the same treatment as other creditors of the Debtor with respect to the delivery of the shares. It does not appear likely that delivery of the shares to Mosher Steel Company at this time could result in a double payment." (Pl. 30).

and in the Order itself stated:

"That the objections to the immediate delivery to Mosher Steel Company of certificates representing

shares of the capital stock of the Debtor in settlement of the said claim pursuant to the Plan of Arrangement are hereby overruled, and the request that said certificates be ordered deposited in escrow pending final determination of *the action now pending before the District Court of the United States for the District of Arizona and instituted by Mosher Steel Company against Union Tank Car Company, Ward Industries Corporation, Fluor Corporation, and others*, is hereby denied." (Pl. 30).

Under these circumstances, how can it be said that Mosher's position in the case at hand and its position in the Chapter XI proceedings were in any way different?

It is fundamental in the Bankruptcy Act that persons having claims against the debtor and others may, and they are encouraged to, file claims in the bankruptcy proceedings.

The liability of a Co-Debtor or Guarantor, or in any manner a Surety for a Bankrupt, is not altered by the discharge of such bankrupt.

> "Section 16. Co-Debtors of Bankrupts. The liability of a person who is a co-debtor with or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." (U.S.C., Title 11, Chap. 3, Sec. 34)

Section 16 is applicable to Chapter XI Proceedings.

> "Section 302. The provisions of Chapters I to VII, inclusive, of this act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter * * *" (U.S.C., Title 11, Chap. 11, Sec. 702).

Cite further *Collier on Bankruptcy*, paragraph 9.32 (11), Vol. 9:

> "Co-Debtors with or Sureties for Debtor.
>
> Whereas an ordinary composition of a principal's debt outside of bankruptcy, resting as it does in contract, is generally held to release the surety, the re-

lease of a principal's debt which results from confirmation of an arrangement does not discharge the surety. That result with respect to co-debtors with or sureties for the debtor is expressly provided for in Section 16 of the Act, which is applicable to Chapter XI proceedings.

The contention is made by Union that since IMI and Ward were partners, that the Trustee in Bankruptcy or, in this case, the debtor in possession should have kept a separate set of claims for those claiming the liability of IMI individually and those claiming the indebtedness of IMI as a member of the joint venture with Ward. This is said to be required under a partnership provision of the Bankruptcy Act (Sec. 5-G).

Of course a joint venture does not necessarily create the same legal relationship as does a partnership. See *Ruby v. United Sugar Companies, S.A.*, 109 P. 2d 845, 56 Ariz. 535, and *Mariani v. Summers*, 52 N.Y.S. 2d 750, affirmed 56 N.Y.S. 2d 537. For example, in New York under the partnership law the partners are liable jointly for all debts other than those involving misapplication of money or property, or tort. Under the Joint Venture Agreement executed by IMI-Ward, IMI-Ward agreed that their obligations under the Joint Venture Agreement would be *joint* and *several.* (See quotations from the Joint Venture Agreement in Appellee's brief in response to Ward)

In addition the Bankruptcy Act provisions relating to the keeping of separate books as to partnership and individual liabilities, and the preferred position of individual creditors against individual assets and partnership creditors against and the arrangement, when finally confirmed, awarded stock in the reorganized corporation.

There is nothing in the record to indicate whether or *not* any separate accounting was kept as between individual and joint venture creditors, nor is there anything in the record

to support the proposition that Mosher benefited at the expense of other creditors in receiving the stock distributed to it. The Bankruptcy Court must be presumed to have discharged its duties properly. Union's position here in reality constitutes a collateral attack upon the judgment of the Chapter XI Court.

Union and Ward, of course, were awarded the status of general creditors of IMI in the Chapter XI proceedings. Union, in fact, received forty percent of all the stock issued upon confirmation of the arrangement. (Pl. 30).

The case which is applicable to the facts herein is *Bridgeport-City Trust Co. v. Niles-Bement-Pond Co.*, 128 Conn. 4, 20 A (2d) 91. The creditor filed its claim against the debtor in a reorganization proceeding and further stated that the claim was filed without prejudice to its rights against the defendant to recover the amount of loans secured by them.

The court, as against a claim by the defendant of bar because of change of position stated "The statement in the claim filed by the plaintiff was a sufficient reservation of its right to enforce the security it held despite the filing of that claim."

RESPONSE TO POINT IV

Summary of Argument

In its final Point, Union takes the Trial Court to task for failure to determine the issue whether Union was a surety for the Joint Venture. The claim or suretyship by Union was brought by way of counterclaim against Mosher (R. 295) rather than against Ward, but the court declined to dismiss the counterclaim, and Mosher answered paragraph 1 of Union's Counterclaim, which had alleged that Mosher had sued Union as surety, in the following language: "1. Plaintiff herein admits the allegations of paragraph 1, and further alleges that the Amended Complaint includes *other counts and allegations* as therein set forth." (R. 617)

Thus Mosher, in answering the Counterclaim, admitted that one of the grounds of its Amended Complaint alleged a cause of action against Union as guarantor, and reiterated that other grounds of its Amended Complaint had alleged that Union's obligation to Mosher was a primary and direct obligtion.

The overwhelming preponderance of the credible testimony and the evidence, has now caused the Trial Court to hold that Union's obligation to Mosher was direct rather than collateral, and for this reason the court rendered judgment that the defendant Union Tank Car Company take nothing by its Counterclaim.

Having entered Findings of Fact and Conclusions of Law finding and concluding a direct obligation to Mosher on Union's behalf, it would appear that additional findings and conclusions based upon the Counterclaim were unnecessary, and we feel sure that this court will agree that the Findings of Fact and Conclusions fully cover the subject matter of the Counterclaim.

CONCLUSION

For the reasons set forth in this brief, Appellee Mosher Steel Company respectfully prays that the judgment entered on May 4, 1966 by the United States District Court for the District of Arizona, sitting at Tucson, Arizona, be affirmed as to Appellant Union Tank Car Company (save for the denial of pre-judgment interest), and Appellee further prays that it be awarded its costs of suit.

Respectfully submitted,

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& NEELY,
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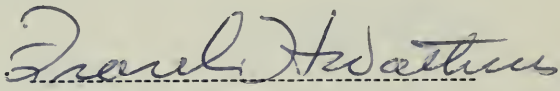
Of Counsel

CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



Frank H. Watkins, *Attorney*